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A TREATISE

ON THE

AMERICAN LAW

OF

VENDOR AND PURCHASER

OF

REAL PROPERTY.

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PART IV.

INCIDENTS OF THE CONVEYANCE.

CHAPTER XXII.

EASEMENTS AND APPURTENANCES.

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§ 1. Easements. The general nature of easements and servitudes has already been considered, and no attempt will be made to again go over the ground that has been traversed.

Technically an easement can only be acquired by grant; yet, more properly speaking, easements may be acquired from necessity, by grant, by reservation, by prescription and by custom, as well as by condemnation under legislative authority and the right of eminent domain. They are said to be *appendant* or *appurtenant* when they are incident to an estate, or *in gross* when purely personal to the holder. When appurtenant they will pass by a conveyance of the land with which they are used, and an appendant easement is appurtenant to all and every part of the land, no matter into how many parts it may be subdivided; it attaches to every part, however small, is to be enjoyed by all the owners of the estate to which it is incident, and cannot be separately sold and conveyed to another.[1]

[1] Garrison v. Rudd, 19 Ill. 558; Underwood v. Carney, 1 Cush. (Mass.) 288.

§ 2. **Appurtenances.** Things which belong to another thing as principal, and pass as incident to the same, are technically termed appurtenances. Thus, a grant of land carries with it, as appurtenant, everything that is necessary to the proper enjoyment of the estate granted. The term is made to cover a wide diversity of subjects, and is often a source of contention for this reason. By the word "appurtenance" nothing passes, however, except such incorporeal easements, rights or privileges as are strictly necessary and essential to the proper use of the estate to which they are annexed;[1] a mere convenience is not sufficient to create such an easement.[2]

Under the head of appurtenances are classed rights of way,[3] rights of flowage,[4] race-ways[5] and water-powers,[6] and generally any other incident in the nature of an easement that is requisite to a fair enjoyment of the grant, or which has been necessarily and incidentally used in connection with the subject of the grant, and which is of a different but congruous nature.[7]

It is an invariable rule, however, that a thing corporeal cannot be made appurtenant to a thing corporeal,[8] and hence that land cannot be appurtenant to land.[9] Thus, a mere easement may, without express words, pass as an incident to the principal object of the grant; but the fee in one piece of land

[1] Ogden v. Jennings, 62 N. Y. 526; Lyman v. Arnold, 5 Mason (C. Ct.), 195; Cave v. Crafts, 53 Cal. 135.

[2] Root v. Wadhams, 107 N. Y. 384.

[3] Story v. Odin, 12 Mass. 157; Leonard v. White, 7 Mass. 6; Collins v. Prentice, 15 Conn. 39; Haven v. Seeley, 59 Cal. 494.

[4] Oakley v. Stanley, 5 Wend. (N. Y.) 523.

[5] N. I. Factory v. Batchelder, 3 N. H. 190.

[6] Pickering v. Stopler, 5 Serg. & R. (Pa.) 107; Grant v. Chase, 17 Mass. 443. Thus, the sale of a mill and of the power therefor presumably includes the actual appurtenances — a race and dam, for instance. Curtis v. Norton, 58 Mich. 411.

[7] See United States v. Harris, 1 Sum. (C. Ct.) 37; United States v. Appleton, 1 Sum. (C. Ct.) 492; Foot v. Calvin, 3 Johns. (N. Y.) 216; Isham v. Morgan, 9 Conn. 374; Kittridge v. Wood, 3 N. H. 503.

[8] Co. Litt. 121*b*.

[9] Riddle v. Littlefield, 53 N. H. 503; Jackson v. Hathaway, 15 Johns. (N. Y.) 447; Otis v. Smith, 9 Pick. (Mass.) 293. But see Mo. Pac. R'y Co. v. Maffitt, 94 Mo. 56, where it is held that while, strictly speaking, the term "appurtenances" should not be used in a deed as applicable to land, still the word has not an inflexible meaning, and may receive its apparent effect.

cannot pass as appurtenant to a distinct parcel which is expressly granted by precise and definite boundaries.[1] There is an apparent exception to this rule made by some of the earlier cases in the construction of wills, and it would seem from the perusal of such cases that the word "appurtenances" has sometimes been construed in such a manner as to take it out of the strict legal and technical interpretation of the term;[2] but this has only been permitted in cases where the question was one of intent, and under special circumstances clearly manifesting the same, and where, from the other parts of the devise, it was evident that the phrase should receive an interpretation beyond its strict legal signification. This enlarged sense of the word is never applied to grants by deed.

It is customary and proper, upon a conveyance of land, to insert the words "together with the appurtenances" in the description of the estate as found in the *habendum* of the deed; but this is a matter of correct conveyancing only — it is not essential to the full operation of the deed; and whatever is in use as an incident or appurtenance of the land will pass with it, whether these words are employed or omitted.[3]

§ 3. **What passes as appurtenant.** The principles enunciated in the foregoing paragraphs have almost indefinite operation in their practical application. Thus, entries, stairways and skylights, made by the owner in fee during unity of seizin, which are apparent and continuous, and necessary to the reasonable enjoyment of the several parts of the building, will be easements upon severance of the title as to the different parts of the building.[4] So, also, a grant of part of the

[1] Jackson v. Hathaway, 15 Johns. (N. Y.) 454; Leonard v. White, 7 Mass. 6. This principle finds its most usual application in the case of rights of way, the grantee having a right to use the land covered by it, but with no interest in the soil.

[2] Thus, in the case of Jackson v. White, 8 Johns. (N. Y.) 59, the terms "appurtenances and privileges" were held to include not only the barn, stables and out-houses used in connection with the property specifically devised, but also the land, consisting of an orchard, pasture, plow and woodland, which had been used by the testator as appurtenant to his other property and conducive to its support. The specific property in this case was a boarding-house. A few English cases support this view.

[3] Comstock v. Johnson, 46 N. Y. 620; Voorhees v. Burchard, 55 N. Y. 102; Wilson v. Hunter, 14 Wis. 684; Farrar v. Stackpole, 6 Me. 154; Cave v. Crafts, 53 Cal. 135.

[4] Morrison v. King, 62 Ill. 30.

grantor's land, with all appurtenances, conveys the easement of a private sewer appurtenant to such part and connected with a sewer adjoining the grantor's land.[1]

§ 4. **Theory of appurtenant easements.** The rule is well settled that when an owner of a whole tenement has by some artificial arrangement of the material properties of his estate added to the advantages and enhanced the value of one portion of it, he cannot, after selling that portion with these advantages openly and visibly attached, voluntarily break up the arrangement and thus destroy or materially diminish the value of the portion sold. The moment the severance of the tenement takes place by the sale of a part, the right of the owner to redistribute the properties of the respective portions ceases, and easements and servitudes are created corresponding to the benefits and burdens mutually existing at the time of sale.[2] Further, that these rules apply to, effect and govern all grantees of the original owner, so that they who purchase the portion of the original tenement benefited acquire the benefits, and they who purchase the portion burdened take it subject to a continuation of the burdens, so far as the benefit portion is concerned.[3]

It is a further rule that parties are supposed to contract in reference to the condition of the property at the time of sale. If the reciprocal benefits and burdens are existing and apparent, and are part of the advantages possessed by the land, the open and visible effect of the easement when presented to the view of the purchaser is presumed to influence his mind, and to move him in his bargaining.[4] It is true that this presumption may be repelled by the actual knowledge of the contracting parties, which may negative any deductions to be drawn from the visible physical condition of the property; and where there is proof of such knowledge, it has been held that they have contracted not solely with reference to its condition as

[1] And the grantor may be compelled by injunction to remove obstructions placed by him in the sewer on his own land. Fitzpatrick v. Mik, 24 Mo. App. 435.

[2] Lampman v. Milks, 21 N. Y. 505; Morrison v. King, 62 Ill. 30; Brakely v. Sharp, 10 N. J. Eq. 206; New Ipswich Factory v. Bachelder, 3 N. H. 190.

[3] Simmons v. Cloonan, 47 N. Y. 3; Thompson v. Miner, 30 Iowa, 386; Fitzpatrick v. Mik, 24 Mo. App. 435.

[4] Curtiss v. Ayrault, 47 N. Y. 73; Morrison v. King, 62 Ill. 30.

it would have been presented to a stranger, but as it was known to be by the parties.[1]

The rule of implied easements is not confined in its operation to the benefit of the grantee, and may be invoked with the same effect in favor of the grantor. It is intended to be, and in its practical application should be, entirely reciprocal; and though it has sometimes been questioned when invoked by the vendor, upon the ground that where the owner has himself severed the unity of title he can claim no right in derogation of his own grant, yet, it is contended, every grant of property naturally and necessarily imports a grant of it as it actually exists, unless the contrary is provided for; and therefore, it is said, it is difficult to see the force of the objection whenever the easement claim is apparent and continuous.[2] Against this

[1] Simmons v. Cloonan, 47 N. Y. 3. As where H. and L., being the owners of certain premises upon which was a mill known as "the old mill," erected a dam and reservoir, and constructed a flume to convey the water from the reservoir to the mill. H., having acquired title to the whole premises, conveyed "the old mill" property to B. The deed contained a grant of the rights and privileges to use the water of the reservoir for the use of the mill, and a condition that, in case the mill should not be kept in use, the water privileges and right of flowing should cease and revert to H. H. subsequently contracted to sell to B. a portion of the premises lying between "the old mill" and the reservoir. B. erected thereon a mill and took the water from the reservoir for its use, abandoning "the old mill," and thereafter assigned the contracts to S., to whom H. conveyed in pursuance of the contract. Neither the contract nor deed made mention of the water privilege. S. conveyed to plaintiff. Subsequently H. conveyed the lands upon which was the reservoir to defendant C., who proceeded to fill up the reservoir and remove the flume. *Held*, that the deed to S. related back to the date of the contract of sale, and was not a contracting between the parties in reference to the condition of the property at the date of the deed; that the right to the use of the reservoir and flume did not pass as an incident or appurtenance to the premises so conveyed, and that by the abandonment of the use of "the old mill" the rights of water and flowage reverted to H., and his grantee had the right to fill up the reservoir and flume. *Ibid.* See, also, for a very interesting discussion and illustration of these principles, Curtiss v. Ayrault, 47 N. Y. 73.

[2] See De Luze v. Bradbury, 25 N. J. Eq. 84; Goodall v. Godfrey, 53 Vt. 225; Kutz v. McCune, 22 Wis. 630. As where the owner of two lots, upon one of which is a spring, and upon the other a paper-mill, to which for many years the water of the spring has been conducted by artificial means, conveys the spring lot without reference to the spring in the deed, either by way of grant or reservation. *Held*, that the grantee takes subject to the easement that the

proposition, however, the law relating to covenants would doubtless militate; and where a grantor conveys with covenants against incumbrances, and with no reservation expressed in the deed, the law will hardly imply one.

§ 5. **Profits a prendre.** The strict and technical definition of an easement excludes a right to the products or proceeds of land, or, as they are generally termed, profits *à prendre;* [1] yet it is generally admitted that such right is in the nature of an easement, and although capable of being transferred in gross it may also be attached to land as an appurtenance and pass as such. The question does not seem to be altogether well settled, however, as a right of this nature is, on general principles, an interest or estate in the land itself, and hence not properly an easement. It is true it is a privilege, as is also an easement; but the latter is a privilege without profit, and is merely accessorial to the rights of property in land, while the former is the reverse. The circumstances of particular cases have much to do with the solution of the question, and it is upon them that it usually turns; and when such construction becomes necessary it seems to be the law that a right to take a profit from another's lands, although capable of being transferred in gross, may also be so attached to a dominant estate as to pass with it by a grant transferring the land with its appurtenances.[2]

water shall continue to be diverted. Seymour v. Lewis, 13 N. J. Eq. 439.

[1] Rights exercised by one in the soil of another, accompanied with participation in the profits of the soil, are termed profits *à prendre.* They differ from easements in that the former are rights of profits, and the latter are mere rights of convenience without profit.

[2] As where H., being the owner of certain lands upon which was a mill-pond, conveyed to A. half an acre adjoining the pond, "with the appurtenances." The deed contained a clause following the description of the land conveyed, whereby, "as an incident to this conveyance," the grantor conveyed to the grantee, "his heirs and assigns," the "exclusive right to take ice from the pond . . . with the right and privilege of access for that purpose to and from the pond to the ice-house to be erected on the lot hereby conveyed." The grantee covenanted to furnish the grantor with ice required for family use. The land conveyed was purchased by A. for the declared purpose of erecting thereon an ice-house to store ice from the pond, and as a means of carrying on the ice business, and he accordingly built said house and engaged in said business. *Held*, that the right thus given was a natural, appropriate and necessary adjunct of the land conveyed, and when exercised became an appurte-

A profit *à prendre* always contemplates a participation of some kind in the profits of the land. It includes many things that ordinarily pass under the head of license, and the distinction between it and an easement is not always palpable. Thus, the right of pasture; of mining; a privilege to fish, hunt, etc., are all profits *à prendre*, and when not granted in favor of some dominant tenement cannot be said to constitute easements, in the proper acceptation of that term, but rather an interest in the land itself.[1] Hence, it would seem that where the right is enjoyed by reason of holding some other estate it may be regarded as an easement appurtenant to such estate, while if held distinct from any ownership or interest in other lands it is itself an estate or interest in the land.[2]

§ 6. **Incidents to a grant as connected with intended uses.** There is another feature of the general subject under consideration, which, while constituting neither an easement nor a servitude in the proper sense of those terms, and not being an appurtenance within the usual definitions, yet in many respects approximates to the character of all of them. This occurs whenever a grant is made for a specific purpose, and the use or purpose necessarily involves certain incidents inseparable from use. Thus, where a conveyance is made of a parcel of land for the right of way of a railroad, while nothing may be said in the deed concerning the manner of its use, yet as the casting of smoke, cinders, ashes, sparks of fire, and the shaking of the soil upon other parts of the land is a necessary incident of the operation of the railroad, and inseparable from the running of trains thereon, the right to do these acts will pass to the grantee and its successors by necessary implication from the express words of the grant. This follows from the principle that where anything is granted all the means to attain it and all the fruits and effects of it are granted also by presumption of law, and will pass inclusive, together with the thing itself; and while a mere conveyance of a part of a tract of land may

nance thereto in the nature of an easement, and passed with the land to the grantee of A. under a conveyance of the land "with the appurtenances." Huntington v. Asher, 96 N. Y. 604.

[1] Post v. Pearsall, 22 Wend. (N. Y.) 425; Waters v. Lilley, 4 Pick. (Mass.) 145; Bingham v. Salene, 15 Oreg. 208.

[2] Mr. Washburn takes this view. See Wash. Easements, 7.

not give the grantee the right to make any use of the part granted which will injuriously affect the remaining portions, yet when the grant is expressed to be for a particular use, neither the grantor nor one claiming under him can object to such use and recover damages resulting therefrom.[1]

§ 7. **Restrictions operating as easements.** The questions relative to the effect and operation of conditions, restrictions and limitations in deeds of conveyance are fully considered in another place; and it will be sufficient to remark, in passing, that in many instances the effect of a condition is to create a right or interest in the nature of an incorporeal hereditament or easement appurtenant to contiguous property. This is noticeably the case in the matter of building restrictions where the grantor imposes a condition in the nature of a servitude or easement upon the land which he sells for the benefit of the land which he retains.

Rights of this character, however created, are called negative easements; that is, the power to restrict the owner of the servient tenement in the exercise of general and natural rights of property, and to compel him to use it in a particular way, either by keeping certain erections thereon, or by keeping them in a particular manner, or by doing other acts calculated to benefit the owner of the adjacent land as the dominant tenement. All such rights are in the nature of incorporeal hereditaments, the right or title to which can only pass by grant, or deed under seal, or be acquired by prescription. When so created they are binding upon the property of the owner of the servient tenement, and inure to the benefit of the owner of such adjacent property and of all those who shall succeed him in his estate as owners thereof.[2]

§ 8. **Servitudes by reservation.** Where it appears, by a fair interpretation of the words of a grant, that it was the intention of the parties to create or reserve a right in the nature of a servitude or easement in the property granted for the benefit of other land of the grantor, and originally forming with the land conveyed one parcel, such right will be deemed appurtenant to the land of the grantor, and binding on that

[1] C., R. I. & P. R'y Co. v. Smith, 111 Ill. 363.

[2] Pitkin v. Long Island R'y Co. 2 Barb. Ch. (N. Y.) 221; Nellis v. Munson, 108 N. Y. 460.

conveyed to the grantee; and the right and burden thus created will pass to and be binding on all subsequent grantees of the respective lots of land.[1] This is frequently the case with respect to rights of way or other easements of like character; but where no private right of way or other easement is reserved in the deed itself, and the purchaser has no notice of such claim, he takes the property without the burden of any such claim, either from the grantor or any person claiming under him.[2]

§ 9. **Grants in fee construed as easements.** The rule is general that words of grant purporting to convey a fee must be construed according to their legal intent, and that a grant in fee thus made will not be pared down to a lesser estate by anything which may follow and which is repugnant to the estate granted. It has been held, however, that, notwithstanding the language employed in the grant clearly imports a conveyance in fee, if it be followed by words which demonstrate intention by a limitation to specific uses, the deed may still be construed only as the grant of an easement.[3]

§ 10. **Easement distinguished from natural right.** There is a certain class of privileges which are sometimes confounded with easements, but which, as a matter of law and fact, have nothing in common with them except the appearance of benefits on the one hand and burdens on the other. This is illustrated in the right which every owner of land through which a natural stream of water flows has to have such stream flow from his land unobstructed in its natural channel, unless such

[1] Kuecken v. Voltz, 110 Ill. 264; Karmuller v. Krotz, 18 Iowa, 353; Child v. Chippel, 9 N. Y. 257; Kent v. Waite, 10 Pick. (Mass.) 138; Whitney v. R'y Co. 11 Gray (Mass.), 365; Winthrop v. Fairbanks, 41 Me. 307. The owner of a lot conveyed the north half thereof, reciting in the deed that he "expressly reserves from this conveyance the right of way over and across the north half of said lot to the south half thereof and back again for teams and men," and afterward conveyed the south half "with all the hereditaments and appurtenances thereunto belonging or in any wise appertaining." *Held*, that the right of way over the north half of the lot was appurtenant to the south half, and passed under the conveyance of the latter. Chicago, etc. R'y Co. v. Ward, — Ill. — (1889).

[2] Patton v. Quarrier, 18 W. Va. 447.

[3] As where, after the use of language clearly importing a conveyance in fee, follow the words, "for the use of a plank-road," the deed should be construed to convey an easement only. Robinson v. R. R. Co. 59 Vt. 426.

right has been curtailed by grant or adverse possession. This is said to be a natural right. Such rights have some semblance to easements, but they are not in fact real easements; for, as every easement is supposed to have its origin in grant, or prescription which presupposes a grant, it would be absurd to suppose that the owner of land at the head of a stream has an easement by grant or prescription for its flow over all the land of riparian owners for many miles to its mouth.

The term "natural easement" is often made use of by courts, especially in the case of flowing water; but the united opinion of able text-writers, as well as the decisions of learned courts, all maintain the principle that a right of this character is a natural right — an incident of property in the land, not an appurtenance to it.[1]

§ 11. Rights of way. A way held by grant or prescription will pass by a conveyance of the land with which it is used and enjoyed as an appurtenance;[2] nor is it essential to the right of a purchaser of such land to the enjoyment of the easement that it shall have been mentioned in his deed. Incorporeal hereditaments appendant or appurtenant to land will always pass by conveyance of the land to which they are annexed without even mention of the appurtenances;[3] and rights of ingress and egress are universally acknowledged as among the most important of the appurtenances annexed to estates.[4]

An easement, as in the case of a right of way, may be created by the disposition made of the premises by the owner of the estate, and upon a severance of the title the purchasers

[1] Johnson v. Jordan. 2 Met. (Mass.) 234; Scriver v. Smith, 100 N. Y. 471; and see Wash. Easements, 276; Ang. Water-courses, § 90.

[2] Kuhlman v. Hecht, 77 Ill. 570; Kent v. Waite, 10 Pick. (Mass.) 138. But the conveyance of a specific piece of ground carved out of a larger piece held by the grantor, and described by metes and bounds, "with all the privileges and appurtenances thereto belonging," carries nothing which is not included within the boundaries, and a right of way through the premises of the grantor does not pass under these words. Grant v. Chase, 17 Mass. 443.

[3] Clark v. Gaffeney, 116 Ill. 362.

[4] Hence, where the grantor of land conveyed to the grantee "the right of passing and repassing, draining and all the useful easements" in and upon other land of the grantor, the easements thus created became appurtenant to the estate conveyed, and susceptible of conveyance to subsequent purchasers as appurtenances without express words. Underwood v. Carney, 1 Cush. (Mass.) 285.

will take their respective shares as they existed in the hands of the former owner; the foundation of the easement, in such and in like cases, being a disposition and an arrangement of the premises as to the use of the different parts by him having the unity of seizin, and then a severance.[1] This has always been the rule where the owner of two tenements or of the entire estate has so arranged and adapted them that one tenement or one portion of the estate derives a benefit and advantage from the other of an open and visible character, and in case of sale the purchaser will take the tenement or portion sold with all the benefits and burdens which so appear at the time of sale to belong to it.[2] Nor is it necessary in such case that the easement claimed by the grantee must really be necessary for the enjoyment of the estate granted. It is sufficient if it is highly convenient and beneficial therefor.[3] These principles have found frequent expression in regard to streets, alleys and other public or private ways; and to appurtenances of this character they apply with all their force and effect.

A right of way in every case is but the mere right to use the surface of the soil for the purpose of passing and repassing and the incidental right of properly fitting the surface for that use, but the owner of the soil has all the rights and benefits of ownership consistent with such easement.[4]

A right in no way connected with the enjoyment or use of land cannot be annexed as an incident to such land so as to become appurtenant thereto,[5] such rights being strictly in gross and personal to the licensee or owner of the privilege. In such case the burden rests upon the servient land in favor of the person entitled thereto, but will not pass by deed of conveyance as an incorporeal hereditament. It is to be observed, however, that the grant of a way is never presumed to be in gross when it can fairly be construed to be appurtenant.[6]

An easement or right of way appurtenant or appendant to an estate in fee in land is incapable of separate alienation or

[1] Cihak v. Kleker, 117 Ill. 643.

[2] Morrison v. King, 62 Ill. 30; Ingalls v. Plamondon, 75 Ill. 118; Huttemier v. Albro, 18 N. Y. 50; Dunklee v. R. R. Co. 24 N. H. 489; Cannon v. Boyd. 73 Pa. St. 179.

[3] Cihak v. Kleker, 117 Ill. 643; McCarthy v. Kitchenman, 47 Pa. St. 239; Jones v. Jenkins, 34 Md. 1.

[4] Perley v. Chandler, 6 Mass. 454.

[5] Linthicum v. Ray, 9 Wall. (U. S.) 241.

[6] Kuecken v. Voltz, 110 Ill. 264; Winthrop v. Fairbanks, 41 Me. 307.

conveyance in fee. It is incident to the land, and passes with it whether the land be conveyed for a term of years, for life or in fee. It is attached to the land, and cannot be separated from or transferred independent of it.[1] So, too, where a right of way is appurtenant to land, it is appurtenant to the whole and to every part of it; and, if such land be divided and conveyed in separate parcels, a right of way thereby passes to each of the grantees.[2]

§ 12. **Ways by necessity.** If a man conveys to another a piece of land surrounded by other lands of the grantor, the grantee and those claiming under him have a right of way of necessity through such other lands of the grantor as incident to the grant;[3] and the same principle applies where the piece of land conveyed is surrounded in part by the lands of the grantor and in part by the lands of a third person. Such right, however, is not perpetual, but continues only so long as the necessity exists.[4] A way of necessity only arises upon the implication of a grant, and cannot be extended beyond what the existing necessities of the case require.[5] It must be more than a mere convenience, and is only commensurate with the existence of the necessity upon which the implied grant is founded.[6]

If the owner of the land can use another way, he cannot claim by implication the right to pass over the land of another, as this right is implied by law solely to secure the party in whom it is vested in the enjoyment of his property; and if the grantee of the dominant tenement, or those claiming under him, afterwards acquires, by purchase or otherwise, a convenient way over his lands to the tenement in favor of which the way of necessity previously existed, the way over the lands of the original grantor of such tenement will cease and the right become extinguished.[7]

[1] Koelle v. Knecht, 99 Ill. 396.

[2] Underwood v. Carney, 1 Cush. (Mass.) 285.

[3] Kuhlman v. Hecht, 77 Ill. 570; New York Ins. Co. v. Milnor, 1 Barb. Ch. (N. Y.) 353; Marvin v. Brewster, etc. Co. 55 N. Y. 553; Collins v. Prentice, 15 Conn. 39.

[4] Ogden v. Jennings, 62 N. Y. 532; Warren v. Blake, 54 Me. 276; Alley v. Carleton, 29 Tex. 79; Pierce v. Selleck, 18 Conn. 321.

[5] Lide v. Hadley, 36 Ala. 627; Pierce v. Selleck, 18 Conn. 321.

[6] Marvin v. Brewster, etc. Co. 55 N. Y. 553; Gayetty v. Bethune, 14 Mass. 49; Nichols v. Luce, 24 Pick. (Mass.) 102.

[7] Carey v. Rae, 58 Cal. 163; Alley v. Carleton, 29 Tex. 79; Ogden v.

Where one has a right of way over another's land, and which is undefined, if the owner of the land impedes the way in use, the former may pass over another part of the land in the course least prejudicial to the owner.[1] The right of locating a way by necessity, however, belongs to the owner of the land; and until such way has been definitely located he may erect buildings thereon or convey a part free from the easement, provided space is left sufficient for a convenient way.[2]

§ **13. City streets.** It would seem to be well established by the preponderance of authority that the owner of a lot abutting on a public street in a city has, as appurtenant to the lot and independent of his ownership of the fee of the street, an easement therein to the full width thereof in front of said lot for ingress and egress, and for the admission of light and air to his property.[3] This peculiar interest neither the local nor general public can pretend to claim; it is a private right in the nature of an incorporeal hereditament, legally attached to his contiguous ground; an incidental title to certain facilities and franchises which is in the nature of property, and which can no more be appropriated against his will than any tangible property of which he may be the owner.[4]

The private right thus enjoyed by the lot-owner is subordinate to the public easement, and to all proper uses to which the street may be put by the public, but aside from this the right is a substantial one.[5]

§ **14. Unopened streets and roadways.** While land is never appurtenant to land, yet highways, streets and roads may be, and often are. This occurs, in many instances, where lands are conveyed with reference to streets and highways which may have no legal existence in fact. Thus, where a convey-

Jennings, 62 N. Y. 532. An easement in land of a right of passage, way to certain buildings is extinguished by the laying out and construction of a highway over the site of such buildings. Hancock v. Wentworth, 5 Met. (Mass.) 446.

[1] Farnum v. Platt, 8 Pick. (Mass.) 339.

[2] Russell v. Jackson, 2 Pick. (Mass.) 574.

[3] Grand Rapids, etc. R'y Co. v. Heisel, 38 Mich. 62; Haynes v. Thomas, 7 Ind. 38; Stone v. R'y Co. 68 Ill. 394; Lackland v. R'y Co. 31 Mo. 180.

[4] Grand Rapids, etc. R'y Co. v. Heisel, 38 Mich. 62.

[5] See Story v. Elevated R'y Co. 90 N. Y. 122.

ance is made describing the land as bounding upon proposed streets, or where such conveyance is made subject to the extension of future streets to be laid out across it, an easement or a right in the nature of an easement is granted or reserved in favor of the party to be benefited, appurtenant to his other lands. The mere projection of such an avenue does not make it a public highway, for acceptance by the public authorities, or a user by the public sufficient to imply acceptance, is essential to the creation of public highways;[1] but the right thus created is distinct from the public right, and in nowise dependent upon the action of the public authorities in the adoption or extension of the street as a public highway. The obvious intention of the parties in such a case to afford a means of ingress and egress, or of access to other lands, is by such a method sufficiently expressed to create an easement of a right of way by an implied grant.[2] Nor does the fact that the language employed refers only to the streets as future dedications to the public at all impair the effect of the deed as an implied grant of an easement. The creation of a public right to be enjoyed *in futuro*, whenever the public authorities shall see fit to adopt the street as a public highway, is not inconsistent with the private easement which inures immediately from the grant; and whenever a dedication as a public highway is effected, as it frequently is, by means of conveyances to private persons by reference to a proposed street over other lands of the grantor, the private rights of the several grantees precede the public right, and are the sources from which the public right springs. By such conveyances the grantees are regarded as purchasers by implied covenant of the right to the use of the street as a means of passage to and from their premises as appurtenant to the premises granted; and this

[1] The reason of the rule is that private persons cannot impose upon the public the expense of the opening or emendation of public highways.

[2] The owner of a narrow strip of land, and also of land adjoining it on the north and on the south, conveyed to the same grantee two parcels of land, one of which was described as bounded south on a "street" and the other as bounded north on an "intended street," the strip of land first mentioned being referred to by these words. It was held that the fee in such strip of land did not pass by the deed, but that the grantee acquired a right of way therein by implication or on the principle of estoppel. O'Linda v. Lothrop, 21 Pick. (Mass.) 292.

private right of way in the grantees is wholly distinct from and independent of the right of passage to be acquired by the public.[1]

§ 15. **Right of flowage.** While a mere convenience is not sufficient to create or convey a right or easement, or impose burdens on lands other than those granted as incident to the grant, yet, where the grantor has imposed the burden upon the land adjoining for his own benefit, it will continue to be attached unless the right to subvert it is expressly reserved; and this principle is nowhere more aptly illustrated than in the conveyances of mills and water privileges. By the conveyance of a mill-site, with a mill turned by water upon it, the right to use the dam and the necessary pondage would pass as appurtenant if the dam and pond were upon the remaining lands of the grantor;[2] and generally the right to overflow the adjoining premises of the grantor to the extent necessary to the profitable enjoyment of privilege purchased, and the manner in which it existed and had been used previous to the grant, will pass to the grantee as necessarily appurtenant to the premises conveyed.[3]

But while the right to flow land will pass as an incident to the purchaser of a mill, and cannot be cut off by the grantor, the rule would seem to be otherwise where the grantor retains the mill-site and conveys the land theretofore subject to flowage; and, in such event, if the grantor makes no reservation

[1] Booraem v. R'y Co. 40 N. J. Eq. 557. There is some controversy whether the private right of way in grantees holding by such conveyances is merged in the public right when the dedication is consummated by public acceptance, or whether it is merely suspended thereby, and will revive if the public right be afterwards abandoned; but the authorities agree that, by such a description, the grantees acquire a right of way as an easement appurtenant to their lands, although the words of the grant indicate also a purpose to make the street a public highway so far as private individuals can make it so by a dedication; and it is upon the theory that the owner of the fee, by grants of rights of way in the street to his grantees, has parted with all beneficial ownership in the street, that the public authorities may take it for a public highway without any compensation to him. Taylor v. Hopper, 62 N. Y. 649; Alden v. Murdock, 13 Mass. 256.

[2] Central, etc. Co. v. Valentine, 29 N. J. L. 567; Leonard v. White, 7 Mass. 6; Oakley v. Stanley, 5 Wend. (N. Y.) 523.

[3] Oakley v. Stanley, 5 Wend. (N. Y.) 523; Tabor v. Bradley, 18 N. Y. 113; Le Roy v. Platt, 4 Paige (N. Y.), 77.

of the right to continue to flow the land, he loses such right, and cannot set up an implied reservation or claim it as an appurtenance.[1]

§ 16. Light and air. As has been stated, it is a well-known doctrine of the common law that where the owner of land sells a part with certain privileges appurtenant, the same being necessary to its full enjoyment, unless there has been an express reservation, he will be concluded from using the remaining part so as to deprive his grantee of the benefit of such privilege, and that being thus estopped himself from doing any act inconsistent with the beneficial enjoyment of the part sold he could not transfer to another the right so to do. This doctrine, in its essential features, has in numerous instances been re-affirmed in this country, and the privileges which it secures to the grantee are usually termed implied easements.

It was formerly thought that under the doctrine just stated, as well as by virtue of numerous English precedents, light and air might be claimed as an easement appurtenant to an estate,[2] and in several instances such has been held to be the law.[3] It must be observed, also, that this doctrine, while presenting many analogies, is based on entirely different principles from the common-law doctrine of ancient lights. That doctrine, while founded on the presumption of grant, is evidenced and established by use and time only, and has very justly been condemned as opposed to our wants and unsuited to the policy of the country. But under the rule first stated, where the grantor, being the owner of two tenements, has seen fit for the benefit of the tenement granted to fix upon that which he retains a servitude, their relative rights and incidents may with propriety be considered as fixed at the time of severance by the first grant. But notwithstanding that the claim of light and air as an appurtenance is based upon much apparent reason,

[1] Burr v. Mills, 21 Wend. (N. Y.) 290.

[2] As where the owner of land with a house thereon sells the house without any exception, or the reservation of any right to build on the adjacent ground or to obstruct the lights in the house which he sold, he cannot afterwards stop those lights by erecting a building on the land adjoining.

[3] Story v. Odin, 12 Mass. 157; Janes v. Jenkins, 34 Md. 1. See, also, Maynard v. Esher, 17 Pa. St. 223; Grant v. Chase, 17 Mass. 443; Cherry v. Stein, 11 Md. 24; Bushnell v. Proprietors, etc. 31 Conn. 158.

and is, withal, in strict analogy to the principles which govern in reference to easements of ways, it does not seem by the later authorities that there can be any claim of right to the same by implication, or any grant thereof unless it be by express terms.[1]

§ 17. **Extinguishment.** Mere non-user, of itself, will not materially affect the right to an easement; but when, by direct proof of a grant or other sufficient evidence, an easement has been conclusively established, there may be proof of an act or declaration of the owner indicative of renunciation or abandonment, followed by non-user for a period long enough to bar an action of ejectment to recover possession of the land; or proof of a claim by the owner of the corporeal estate, or another in his behalf, known to the owner of the easement, or evinced by acts that in the exercise of ordinary vigilance he would have learned, followed by non-use by the owner for such period; or an act or declaration by the owner of the easement, clearly demonstrative of actual abandonment of the easement, that in fact promotes some action on the part of another by which, if the easement were not held to be determined, the latter would be seriously injured. And such proof may conclude the extinguishment of the easement. But nothing less than one or the other of these combinations of facts will have such effect.[2]

Mere non-user, if continued for twenty, years will afford a presumption of extinguishment; but this presumption is not very strong, particularly if unaided by other circumstances. Non-user for a period of twenty years, under such circumstances as show an intention to abandon and give up the easement, is sufficient to extinguish it; and even an abandonment for a shorter period under such circumstances as show intention to give up and release an easement, which is acted upon by the owner of the servient tenement so that it would work harm to him if the easement were thereafter asserted, would operate to extinguish the same.[3] It would seem, however, that

[1] See Keates v. Hugo, 115 Mass. 204; Mullen v. Strickler, 19 Ohio St. 135; Pierre v. Fernald, 26 Me. 436. Compare Powell v. Sims, 5 W. Va. 1; Royce v. Guggenheim, 106 Mass. 201.

[2] Warren v. Syme, 7 W. Va. 476; Kuecken v. Voltz, 110 Ill. 264; Eddy v. Chase, 140 Mass. 471.

[3] See Vogler v. Geiss, 51 Md. 407; Steere v. Tiffany, 13 R. I. 568; King

the question of abandonment is always one of intention, depending largely upon the facts of each particular case; and while time is one of the elements from which intention may be inferred, yet it is not a necessary element, and the question seems to depend less upon the duration of time than the acts which accompany the fact of disuse. The owner of a dominant tenement may make such changes in the use and condition of his estate as to renounce the easement; and this may be relied on by the owner of the servient tenement as an abandonment thereof. But in order to prove such abandonment it must be shown that the acts relied on were done voluntarily by the owner of the inheritance, who had authority to bind the estate by his grant or release, and were of so decisive and conclusive a character as to prove his intention to abandon the easement.[1]

v. Murphy, 140 Mass. 254; Bank v. Nichols, 64 N. Y. 65.

[1] Dyer v. Sanford, 9 Met. (Mass.) 395.

CHAPTER XXIII.

USES AND TRUSTS.

§ 1. General principles—Definition.
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§ 1. General principles — Definition. That which in the law of real property now goes by the name of a trust seems, by the ancient books, to have been originally denominated a *use*, and was defined as a confidence reposed in some other, not issuing out of the land, but as a thing collateral, annexed in privity to the estate of the land and to the person touching the land, for which the *cestui que trust* has no remedy save in chancery.[1] By a later definition it is described as a right of property, real or personal, held by one party for the benefit of another,[2] and consists of an equitable right, title or interest in the property distinct from its legal ownership.

Trusts are variously classed as active or passive, express or implied, executed or executory.

The exact origin of trusts cannot be definitely stated; but their adaptation to the English law may, it is said, be traced, in part at least, to the ingenuity of fraud; as by the interposi-

[1] 1 Lewin, Trusts, 13.

[2] 2 Bouv. Law Dict. tit. Trusts.

tion of a trustee the debtor thought to withdraw his property out of the reach of his creditor, the freeholder to intercept the fruits of tenure from the lord of whom the lands were held, and the body ecclesiastic to evade the restrictions directed against the growing wealth of the church by the statutes of mortmain.[1] Another inducement to the adoption of the new device, says Mr. Lewin, was the natural anxiety of mankind to acquire that free power of alienation and settlement of their estates which, by the narrow policy of the common law, they had hitherto been prevented from exercising.[2]

The device grew with years into a highly complex and subtile system, most ingenious in its details and far reaching in its scope, and became incorporated into the common law of the United States together with numerous other old-world legal exotics. Its elucidation has called forth some of the best thoughts of the foremost jurists of the country, and much has been written upon the subject in times past. But when the state of New York, during the latter part of the first half of the present century, made its sweeping changes in legal procedure, the whole doctrine, with all its refinements and subtilties and its accumulation of precedents and curious learning, was abolished, and by statute a few simple rules were established to govern this branch of the law. The action of New York was followed by the other states, and now the whole subject is the result of special legislation and state construction.

It is not proposed to enter into any general discussion of the nature and character of trusts, nor of the powers and duties of trustees, or the rights of beneficiaries; yet, as the subject is incidental to the theme now under consideration, and as trusts frequently intervene in the transfer of lands, even when not so

[1] At an early period a practice arose in England of one person's conveying lands to another with a private agreement that the latter should hold the lands for the benfit and profit of the feoffor or of a third person. The practice did not become general till the time of Edward III., when it was resorted to by the churchmen to evade the statutes of mortmain, and enable them to receive the rents and profits of lands which those statutes prohibited them from receiving and holding in their own names. Such a conveyance, made nominally to one person but for the benefit of another, vested the legal estate in the former, and in the latter what the law termed *a use*. 1 Hill. Abridg. 190.

[2] 1 Lewin, Trusts, 1.

intended by the parties, a work on vendor and purchaser would be necessarily incomplete without some passing allusion to the topic.

§ 2. **What trusts allowed.** The whole subject of trusts is almost purely statutory in the United States, the common law in this respect having been long since abrogated in every state; and at the present time trusts can only be raised or declared, as a general rule, for the following purposes: (1) To sell lands for the benefit of creditors; (2) to sell, mortgage or lease lands for the benefit of legatees, or for the purpose of satisfying any charge thereon; (3) to receive the rents and profits of lands and apply them to the use of any person during the life of such person, or for any shorter term, subject to the rules prescribed by statute fixing the quantity and duration of estate; (4) to receive the rents and profits of lands and to accumulate the same for the benefit of any married woman, or for any of the purposes and within the limits of the statute prescribing the nature and quality of estates; (5) for the beneficial interests of any person or persons, when such trust is fully expressed and clearly defined upon the face of the instrument creating it, subject to the limitations, as to the time and the exceptions thereto, relating to literary and charitable corporations, prescribed by the statute.

Trusts resulting from implication of law are always recognized, and have not been materially affected by statute, except that the scope of the doctrine of such trusts has been very much circumscribed as described in the succeeding paragraphs.

§ 3. **The subject-matter.** As a rule any estate or interest in lands, whether legal or equitable, may be made the subject of a trust, provided the settler has the legal power and the *cestui que trust* the capacity, the one to give and the other to receive, the beneficial interest intended.[1]

§ 4. **The parties.** The parties to a trust are three: the *settler*, the *trustee*, and the *cestui que trust* or *beneficiary*. As the creation of a trust is a modification of property in a particular form, it may be laid down as a general rule that whoever is competent to deal with the legal estate may, if he be so

[1] Robinson v. Mauldin, 11 Ala. 977; Carty v. Blevins, 5 Yerg. (Tenn.) 195.
Calkins v. Lockwood, 17 Conn. 154;
Bank v. Hastings, 15 Wis. 75; Mc-

disposed, vest it in a trustee for the purpose of executing the settler's intention;[1] and such intent must be carried into effect unless it contravenes some rule or policy of law.[2] So, too, any person capable of taking and holding the property of which the trust is declared and possessed of sufficient legal ability to execute the same may properly be a trustee. They may be natural persons or corporations.[3] Any person who may be capable of taking the legal estate may, through the channel of trust, be made recipient of the equitable estate.

A trust created for the benefit of a third person, though without his knowledge, may be affirmed by him, and its execution enforced.[4]

§ 5. **Creation of trusts.** Under the principle that parol evidence cannot be received to vary or contradict a written instrument, it is the established rule that a trust in lands cannot be set up or proved in opposition to an absolute deed, unless the same shall be proved by some writing duly signed or subscribed by the proper party.[5] Where the original conveyance fails to declare the trust it may be proved by a separate informal instrument simultaneous with or subsequent to such conveyance;[6] but generally, while a trust may be declared in a separate instrument accompanying the deed, such separate instrument must be contemporaneous, as the rights of the grantee cannot ordinarily be defeated by a subsequent and wholly independent act of the grantor.[7]

No particular form is necessary in the creation or declaration of a trust,[8] and almost any writing in which the fiduciary relation is shown and the terms manifested will be sufficient

[1] Lewin, Trusts, *21.

[2] Wright v. Miller, 8 N. Y. 9.

[3] It was formerly held that a corporation could not be seized of a use; for, as was gravely observed, it had no *soul*, and could there be any confidence reposed in it? But it is a universal rule that corporations may now act as trustees if not inconsistent with their charters. See Trustees v. King, 12 Mass. 546; *In re* Newark Savings Inst. 28 N. J. Eq. 552.

[4] Neilson v. Blight, 1 Johns. (N. Y.) 205.

[5] Pinney v. Fellows, 15 Vt. 525; Cornelius v. Smith, 55 Me. 528; Shafer v. Huntington, 53 Mich. 310.

[6] Simo v. Howard, 4 Nev. 473.

[7] Bennett v. Fulmer, 49 Pa. St. 155; De Laurencil v. De Boom, 48 Cal. 581; Brown v. Brown, 12 Md. 87.

[8] Fisher v. Fields, 10 Johns. (N. Y.) 495; Urann v. Coates, 109 Mass. 581; Chamberlain v. Thompson, 10 Conn. 243.

for the purpose.[1] It is essential, however, that the nature and terms of the trust be explicitly declared, as well as the party for whose benefit it is raised, its extent, and the property covered or affected by it.[2] Certainty of expression in each of these details seems to be of prime importance; and if the language in respect to either is so vague, general or equivocal that any of the necessary elements of the trust is left in doubt it will fail.[3]

Where a trust is intended by a conveyance, but fails entirely, so that the grantee takes no estate in the land under the conveyance, it may nevertheless create in him a valid power in trust, the legal title remaining in the grantor. But where the deed creates a valid trust, the entire estate vests in the trustee, subject only to the execution of the trust, except as otherwise provided; and where the deed gives a power of sale to the trustee at the request and for the benefit of the beneficiary under the deed, no power of revocation being reserved, no estate in the premises is left in the grantor which is capable of being transferred.[4]

The only exceptions to the general rule excluding parol evidence to establish a trust are in cases of fraud, accident and mistake;[5] but in every such case the evidence must be of so positive a character as to leave no doubt of the fact, and so clearly define the trust that the court may see what is requisite for its due execution.[6]

§ 6. Words of limitation. Conveyances to uses are construed in the same manner as deeds, deriving their effect from the common law, and, unless excepted by statute, the word

[1] May be shown by letters. Montague v. Hayes, 10 Gray (Mass.), 609; Kingsbury v. Burnside, 58 Ill. 310. By receipts. Faxon v. Falvey, 110 Mass. 392. Recitals in deeds. Wright v. Douglass, 7 N. Y. 564. Or bonds, Bragg v. Paulk, 42 Me. 502. By affidavits. Pinney v. Fellows, 15 Vt. 525. Or by court pleadings. Patton v. Chamberlain, 44 Mich. 5.

[2] Cook v. Barr, 44 N. Y. 156; Dillaye v. Greenough, 45 N. Y. 438; Jacobs v. Miller, 50 Mich. 126; Ruth v. Oberbrunner, 40 Wis. 238; McClellan v. McClellan, 65 Me. 506.

[3] Steere v. Steere, 5 Johns. Ch. (N. Y.) 1; Dillaye v. Greenough, 45 N. Y. 438.

[4] Marvin v. Smith, 46 N. Y. 571; Leonard v. Diamond, 31 Md. 536.

[5] Jackson v. Jackson, 5 Cow. (N. Y.) 173; Patchin v. Pierce, 12 Wend. (N. Y.) 61; McNew v. Booth, 42 Mo. 192.

[6] Bragg v. Paulk, 42 Me. 502; Cook v. Barr, 44 N. Y. 156; Fouty v. Fouty, 34 Ind. 435.

"heirs" is necessary to create a fee. But while courts of equity, in construing the limitation of trusts, adopt the rules of law applicable to legal estates,[1] it is subject to the maxim in equity that a trust once created shall not fail for want of a trustee, and that the court will follow the estate into the hands of a legal owner, whoever he may be, and compel him to give effect to the trust by the execution of proper assurances, unless such estate has gone to a *bona fide* purchaser for value.[2] Such construction is also subject to the further rule that all deeds shall be construed favorably and as near the apparent intention of the parties as is possible consistent with the rules of law; and while, to create a fee, the limitation must be to heirs, it is not required to be in direct terms, but may be made by immediate reference. Thus, where a conveyance is in trust, but without direct words of inheritance, the trustee will nevertheless take a legal estate in fee if the trust limited upon it be to the *cestui que trust* and his heirs. The words of limitation and inheritance in such case, although they are connected with the estate of the *cestui que trust*, will be held to relate to the legal estate of the trustee in order to give effect to the intention of the parties, and because, without such construction the trustee would not be able to execute the trust.[3] This rule applies as well to a grant upon a simple trust as to grants with special powers or active duties in the trustee.

§ 6. **Declaration of trust.** A trust cannot be established by parol[4] except in the case of resulting trusts; yet while such

[1] Cushing v. Blake, 30 N. J. Eq. 689.

[2] In Weller v. Rolason, 17 N. J. Eq. 13, the testator directed his executor to invest the residue of his estate in the purchase of a house and lot, to belong to his widow during her widowhood, and on her death to be sold and equally divided among his children. The executor made the purchase and took a deed to himself as executor, without words of inheritance. The executor and the widow having died, on a bill filed by the testator's children to have the lands applied to the purposes of the trusts declared in the testator's will, a decree was made against a purchaser from the grantor's heirs, having knowledge of the trust, that a conveyance be made in fee, and that the lands be sold and the proceeds applied to the trusts declared in the testator's will.

[3] Newhall v. Wheeler, 7 Mass. 189; Cleveland v. Hallett, 6 Cush. (Mass.) 404; North v. Philbrook, 34 Me. 537; Welch v. Allen, 21 Wend. (N. Y.) 147; Melick v. Pidcock, 15 Atl. Rep. (N. J.) 3.

[4] Moran v. Hayes, 1 Johns. Ch. (N. Y.) 339.

trust must be manifested by some writing, formality is unnecessary; and generally where the trust is not declared in the conveyance, any instrument executed simultaneous with or subsequent thereto will be sufficient if duly signed or subscribed by the trustee.[1] These instruments have acquired the name of declarations of trust, but though the name carries with it a formal sound it is sufficient that they evidence a notice that the property in fact belongs to certain named beneficiaries.[2] An explicit statement of a party declaring himself a trustee is all that is required,[3] but this may take the form of a letter [4] or be embodied in an agreement;[5] and while certainty is required in this as in all other species of writings relating to interests in lands, it seems that if the instrument clearly shows the trust, but fails to describe the lands, it may be shown by the facts and circumstances surrounding the case that such instrument referred to the lands in question.[6]

But while any untechnical writing, if it clearly expresses intention and sufficiently connects the trustee with the subject-matter of the trust, will answer all the requirements of law, yet loose and general declarations are not sufficient for the deduction of a trust which equity will recognize and enforce; and parol evidence can be received, if at all, only to explain the obscurity of the case.[7] The terms and conditions should be clearly manifested, so that a court may not be called upon to execute the trust in a different manner from that intended.[8]

§ 7. Execution of trust by trustee. Where the legal title of a trustee is created by the owner of the property, the right of the trustee to exercise and enforce the trust will be recognized everywhere.[9] In case of a joint delegation of power of

[1] Sime v. Howard, 4 Nev. 473; Pinney v. Fellows, 15 Vt. 525; Cornelius v. Smith, 55 Mo. 528; Bates v. Hurd, 65 Me. 180; Malin v. Malin, 1 Wend. (N. Y.) 657.

[2] Ins. Co. v. Campbell, 95 Ill. 267; Brown v. Combs, 29 N. J. L. 39.

[3] Moore v. Pickett, 62 Ill. 158; Tanner v. Skinner, 11 Bush (Ky.), 120.

[4] See Brown v. Combs, 29 N. J. L. 39; Kingsbury v. Burnside, 58 Ill. 310, in which it was held that it is fully sufficient if the recognition or admission of the trust is incidentally made in the course of a correspondence.

[5] Baldwin v. Humphrey, 44 N. Y. 609; Packard v. Putnam, 57 N. H. 43.

[6] Moore v. Pickett, 62 Ill. 158.

[7] Steere v. Steere, 5 Johns. Ch. 1.

[8] Dillaye v. Greenough, 45 N. Y. 438; Cowan v. Wheeler, 25 Me. 282.

[9] But where such title is derived solely from some act of the law, the effect of the act is confined to the territorial jurisdiction over which

sale it must be executed by all, provided all are living and in condition to act,[1] unless the instrument creating the trust provides otherwise;[2] for the interest held by the several trustees is an entirety, and can only pass as a whole; hence all the trustees living, having an interest in the property, must join in the conveyance, otherwise it will be wholly inoperative.[3] But in case of the death of one or more of the trustees, the survivor or survivors will hold the trusts and may execute the powers.[4] A deed by the survivors, representing the entire title, will be good, even though they are authorized to fill the vacancy, as it is only where the terms of the power creating the trust imperatively require the vacancy to be filled that the acts of the survivors will be invalid.[5]

§ 8. **Execution of trust by statute.** Under the statute of uses now in force in nearly every state, where an estate is conveyed to one person for the use of or upon a trust for another, and nothing more is said, the statute immediately transfers the legal estate to the use, and no trust is created, although express words of trust are used. In such case the legal estate never vests in the feoffee, but is instantaneously transferred to the *cestui que use* as soon as the use is declared.[6] Such a trust is known as a dry or passive trust, and occurs whenever any person by any means becomes clothed with the legal title to land in which he has no beneficial interest, and with respect to which he has no duty to perform, so that he simply stands seized of the land to the use of some other person. In such case the statute will execute the use by annexing the possession to the use and clothing the latter with the legal title.[7] In such event no conveyance from the so-called trustee to the beneficiary is necessary;[8] but where the legal title is properly vested in a trustee, nothing short of reconveyance can place the same back in the grantor or his heirs.[9]

the law extends. Curtis v. Smith, 6 Blackf. (Ind.) 537.

[1] Learned v. Welton, 40 Cal. 349.

[2] Gould v. Mather, 104 Mass. 283.

[3] Golder v. Brewster, 105 Ill. 419; Brennan v. Willson, 71 N. Y. 502.

[4] Golder v. Brewster, 105 Ill. 419.

[5] Golder v. Brewster, 105 Ill. 419.

[6] Kirkland v. Cox, 94 Ill. 400; Ready v. Kearsley, 14 Mich. 215; Steevens v. Earles, 25 Mich. 44; Riehl v. Bingenheimer, 28 Wis. 84; White v. Fitzgerald, 19 Wis. 480; Matter of Winter, 34 N. Y. 567.

[7] Meacham v. Steele, 93 Ill. 135; Goodrich v. Milwaukee, 24 Wis. 422; Thompson v. Waters, 25 Mich. 214.

[8] Matter of Winter, 34 N. Y. 567.

[9] Kirkland v. Cox, 94 Ill. 400.

The test in determining the character of instruments of this kind seems to be that if they impose on the trustee active duties with respect to the trust estate, such as to sell and convert into money, or to lease the same and collect the rents, pay taxes, etc., and pay the net proceeds to the beneficiary, it creates an active trust which the statute does not execute; but if there is simply a conveyance to the trustee for the use or upon a trust for another, and nothing more is said, then the statute immediately transfers the legal estate to the use and no trust is created, although express words of trust are used.[1]

§ 9. Trust of rents and profits. A trust for the use and benefit of the beneficiary, not requiring any action or management on the part of the trustee, except, perhaps, to make conveyance at the direction and by the appointment of the beneficiary, comes within the inhibition of the statute as now generally enacted in all of the states, and the trust simply inures as a legal estate in the beneficiary.[2] A trust to receive and pay over rents and profits, however, is valid; and so a trust authorizing the trustee to manage, control and dispose of the trust estate and the income thereof, and the same to pay over to a beneficiary for his maintenance and support, has been held to be substantially a trust to receive the rents and profits of the estate and apply the same to the use of the beneficiary, and therefore valid as being within the terms of the statute.[3]

§ 10. Duties and obligations of trustees. A trust for any proper purpose once created and duly accepted imposes an obligation on the trustee that cannot be divested merely by resignation or refusal to act.[4] To effect such an end requires the consent of all the beneficiaries or an order of discharge duly entered by a court of competent jurisdiction.[5] By the acceptance of the trust the trustee subjects himself to the performance of all the duties which the trust imposes upon him, and to all the disabilities which attach to the relation. He is bound to account both to the mandator and the *cestui que trust*, and

[1] Kellogg v. Hale, 108 Ill. 164; Kirkland v. Cox, 94 Ill. 168.

[2] See Leggett v. Hunter, 19 N. Y. 454.

[3] Campbell v. Low, 9 Barb. (N. Y.) 594.

[4] Puzy v. Senier, 9 Wis. 370; Cruger v. Halliday, 11 Paige (N. Y.), 314.

[5] Gilchrist v. Stevenson, 9 Barb. (N. Y.) 15.

can never contest the rights or claims of his principals while he holds possession of the property. He cannot appropriate the trust property to his own use, although he may charge himself with the value thereof; nor can he become a purchaser at his own sales, whether public or private. He has no right to barter or traffic with the trust estate, or to use for his own benefit the money arising from the sales of the same, and generally he is bound to the exercise of the utmost good faith in every transaction connected with and growing out of the trust.[1] He is not liable for loss while acting in good faith, but will be held responsible for breach or neglect of duty.[2] The trust being founded on personal confidence, it necessarily results that a trustee cannot delegate his trust to others,[3] and is himself responsible for the acts of his subordinates in whatever character they may act, while the power under which he acts must in all cases be strictly pursued to render his acts valid.[4]

Upon the death of a sole trustee the legal estate devolves upon his heir at law; and the heir takes the same estate and is subject to exactly the same duties and responsibilities as his ancestor.[5] But, as has been shown, in case of more than one the rule would be different; for by the common law, and usually by the statutes as well, the estate of trustees is held in joint tenancy, and hence upon the death of one of several trustees nothing passes to the heir, but the whole estate devolves upon the survivors.[6] Where a person holds lands in his own name, but is only a trustee, and dies leaving a will, the rule is that the legal estate in such lands will pass by such general words as are sufficient to comprehend it in legal construction, unless from circumstances appearing on the face of the will it can be collected that the testator meant to de-

[1] Geisse v. Beall, 3 Wis. 367; Wright v. Ross, 36 Cal. 432; Blauvelt v. Ackerman, 20 N. J. Eq. 148; Terwilliger v. Brown, 44 N. Y. 237.

[2] Thompson v. Brown, 4 Johns. Ch. (N. Y.) 619; Duffy v. Duncan, 32 Barb. (N. Y.) 587.

[3] Grover v. Hale, 107 Ill. 638.

[4] Huntt v. Townshend, 31 Md. 336.

[5] Watkins v. Specht, 7 Coldw. (Tenn.) 585; McMullen v. Lank, 4 Houst. (Del.) 648. By force of the statute the trust sometimes vests in some tribunal in the county in which the real estate is situated, which upon the application of some person interested in the trust forthwith appoints a successor to the deceased trustee, whereupon the trust vests in the newly-appointed trustee. Collier v. Blake, 14 Kan. 250.

[6] Golder v. Brewster, 104 Ill. 419.

vise his own property only, and not property which he held as trustee. If this should be apparent from the will the legal title of trust property will not pass by the will, although general words are used sufficiently comprehensive to embrace the lands. It is said the circumstances which weigh against the presumption are a charge of debts, limitations in strict settlement, or any other disposition inconsistent with the idea of its being trust property, and which leads to the inference that the testator could not have intended to give the legal estate of such property.[1]

§ 11. Disposition of trust property. In the management and disposition of trust property the conduct of trustees must be regulated and controlled by the provisions of the deed of trust under which they hold. This makes the law by which they are to be governed; and trustees accepting the trust upon the terms and conditions of the deed creating the same have no power to alter, change or dispense with those terms or conditions. If the deed minutely and particularly prescribes the circumstances under which and the manner in which the trustees shall have authority to sell or otherwise dispose of the trust property, they have no power or authority to dispose of it under any other circumstances or in any other manner.[2]

It is customary, and in some cases necessary, to make special mention in a deed by a grantor under a power of the power under which he assumes to act, and to show that the conveyance is made in the execution of such power; but it seems that a trustee of real estate with power to sell may convey without setting forth the trusts under which he holds, and a conveyance by him purporting to be in his own right, he having the legal estate, will be good; and although the deed to him contains a proviso that all conveyances by him in the disposi-

[1] The Farmers' Fire Ins. & Loan Co. foreclosed a mortgage upon lands, and E. T., its president, bought the same in his own name and had it so conveyed, but in truth for the company. E. T. died before it could be made over to the company, and left a will wherein he bequeathed and devised his personal property and real estate, by the description of "all my real estate," to executors upon trusts for his children (some of whom were infants). Upon a sale of said lands it was *held* that the title and conveyance must come from the children of E. T. and did not pass to the executors under his will. Merritt v. Farmers', etc. Co. 2 Edw. Ch. (N. Y.) 547.

[2] Huntt v. Townshend, 31 Md. 336; Tyson v. Latrobe, 42 Md. 337.

tion of the property shall express the trusts upon which the property is granted to him, and he omits in the conveyance by him to set forth such trusts—such provisions being merely directory, and not a condition precedent—the omission to set forth the trusts does not at law affect the validity of the conveyance, and under certain circumstances this would also be true in equity.[1]

§ 12. **Purchaser of trust estate.** A purchaser of a trust estate, with knowledge of the trust, is subject to all the duties in respect to the same which rested upon the trustee from whom he purchased. If the sale is made in violation of the trust such purchaser can acquire nothing thereby, but will be deemed in equity to take and hold only as a trustee, and the property in his hands will remain charged with the trust and subject to its execution.[2]

A *bona fide* purchaser without notice, to be entitled to protection, must be so not only at the time of the contract for conveyance, but until the purchase money is actually paid.[3]

§ 13. **When purchaser must see to application of purchase money.** It is among the oldest rules of the law of trusts that the purchaser from a trustee is bound to see to the application of the purchase money. But this rule is generally stated with the limitation that he is only thus bound where the trust is of a defined and limited nature, and not where it is general in its character; that is, if the trust be of such a nature that the purchaser may reasonably be expected to see that it is properly applied. Thus, if it be for the payment of legacies, or of debts which are scheduled or specified, the purchaser is bound to see that the money is applied accordingly. But where the purchase money is to be re-invested upon trusts that require time and discretion, or the acts of sale and re-investment are contemplated to be at a distance from each other, the purchaser is not bound to look to the application of the purchase money.[4] Nor will a purchaser be compelled to see to the application of the purchase money where the trust is for the payment of

[1] Bradstreet v. Clarke, 12 Wend. (N. Y.) 602.

[2] Wilson v. Mason, 1 Cranch (U. S.), 45; Williams v. Thorn, 11 Paige (N. Y.), 459.

[3] Wormley v. Wormley, 8 Wheat. (U. S.) 419.

[4] Wormley v. Wormley, 8 Wheat. (U. S.) 419.

debts generally, where long delay may be necessary in order to ascertain who are creditors, or where the investigation and examination of accounts is involved.[1]

Specified or scheduled debts and legacies have been held to come within the rule, and to impose upon the purchaser the burden of seeing that the money paid is properly applied;[2] but the strict doctrine of the English rule has always been enforced in American courts with apparent reluctance.

The doctrine of the obligation of purchasers to observe the proper application of the purchase money in cases of sales by heirs, devisees, trustees and other fiduciaries was formerly very intricate and profound, abounding in nice distinctions and subtile gradations; but these in a large measure have been swept away by special statutes in England, while in the United States the old English doctrine has rarely been administered except in cases of fraud in which the purchaser was a participant. The general rule now is, and for years past has been, that a purchaser who in good faith pays the purchase money to a person authorized to sell is not bound to look to its application; and there is no difference in this respect between lands charged in the hands of an heir or devisee with the payment of debts and lands devised to a trustee to be sold for that purpose.[3]

§ 14. Trustee's deed as color of title. A conveyance of lands by a trustee, professing to convey the whole and absolute title, is a good foundation for an adverse possession; and it is immaterial for that purpose whether the trustee have the requisite authority to convey or not. A possession taken under such conveyance, with a claim of title, and a continuance of such possession for the statutory period, is as adverse to the grantor, and to every other person claiming the same title, as it is to all the rest of the world. It is true that a

[1] Potter v. Gardner, 12 Wheat. (U. S.) 498; Goodrich v. Proctor, 1 Gray (Mass.), 570; Stall v. Cincinnati, 16 Ohio St. 169; Andrews v. Sparhawk, 13 Pick. (Mass.) 393; Dewey v. Ruggles, 25 N. J. Eq. 35.

[2] Bugbee v. Sargent, 23 Me. 269; Leavitt v. Wooster, 14 N. H. 560; Swasey v. Little, 7 Pick. (Mass.) 296.

[3] Cryder's Appeal, 11 Pa. St. 72; Champlin v. Haight, 10 Paige (N. Y.), 275: White v. Carpenter, 2 Paige (N. Y.), 217; Gardner v. Gardner, 3 Mason (C. Ct.), 178.

deed professedly executed under a power will not pass the estate if the power did not in fact exist; yet it is sufficient to give color to the grantee's claim of title, and stands upon the same footing with any other deed which, for the want of title in the grantor, or for any other defect, does not actually pass the estate.[1]

§ 15. **Resulting trusts.** A resulting trust has been defined as a trust raised by implication or construction of law, and presumed to exist from the supposed intention of the parties and the nature of the transaction. There is some confusion in the books as well as in the reported cases as to what circumstances will create a resulting trust, and the distinction between what may be properly so classed and those which the law denominates constructive trusts is not always clearly drawn. In all cases of resulting trust the material element is intention, existent although unexpressed; a constructive trust, on the other hand, being raised independently of any such intention, and forced on the conscience of the trustee by equitable construction and operation of law. Where an estate has been conveyed, notwithstanding the investure of the purchaser with the legal title, if it appears, or may be inferred from the terms of the conveyance or the accompanying facts and circumstances, that the beneficial interest belongs to or should be enjoyed by another, a trust is implied or results in his favor.

A resulting trust arises (1) when the estate is purchased in the name of one person, while the consideration is advanced by another; (2) when a conveyance is made in trust, declared only as to part, and the residue remains undisposed of, nothing being declared respecting it; and (3) in cases of fraud.[2] It is never created by agreement, but always results by implication of law from acts, independent of agreement;[3] and there can be no resulting trust where the use is expressly limited to the grantee in a deed.[4]

[1] Jackson v. Johnson, 5 Cow. (N. Y.) 101; Bradstreet v. Clarke, 12 Wend. (N. Y.) 602.

[2] Long v. Steiger, 8 Tex. 460; Campbell v. Campbell, 21 Mich. 438; Barnet v. Dougherty, 32 Pa. St. 371; Reeve v. Strawn, 14 Ill. 91; Kennedy v. Nunan, 52 Cal. 326; McCollister v. Willey, 52 Ind. 382; Johnson v. Quarles, 46 Mo. 423; McGovern v. Knox, 21 Ohio St. 551.

[3] Sheldon v. Harding, 44 Ill. 68; Stevenson v. Thompson, 13 Ill. 186.

[4] Donlin v. Bradley, 119 Ill. 412.

A resulting trust is not within the statute of frauds, and may be proved by parol.[1]

A resulting trust arises, if at all, only upon an actual conveyance of land, and never upon a mere executory contract,[2] and only at the time of the execution of the conveyance.[3] The payment of the purchase money must, in order to raise the trust, have been made or the liability for it incurred as a part of the original transaction of purchase, and not pursuant to any subsequent agreement or arrangement between the parties.[4] Hence, after the legal title has passed to the grantee by the execution of the deed, no subsequent application of the funds of a third person, whether for the improvement of the property, payment of the purchase money or other purpose will be sufficient to raise a trust so as to divest the legal estate of the grantee.[5]

The essence of a resulting trust is intention, and the mere fact of the payment of the purchase money will not be sufficient to raise it if it was not the intention that the estate should belong to the person so paying. It is a mere creature of equity, founded upon presumptive intention, and designed to carry such intention into effect, and can never be raised in favor of any person against the intention of the parties.[6]

In a number of states the doctrine of resulting trusts has been greatly modified or entirely abolished by statute; and where the parties in interest have consented to this form of conveyance or had full knowledge of the facts, the title vests in the grantee as in other cases.[7] But in every such case the transaction must be fairly and understandingly entered into, with no mixture of abused confidence, fraud or oppression.

[1] Foote v. Calvin, 3 Johns. (N. Y.) 216; Malin v. Malin, 1 Wend. (N. Y.) 625; Ward v. Armstrong, 84 Ill. 151.

[2] Johnson v. Krassin, 25 Minn. 118.

[3] Williard v. Williard, 56 Pa. St. 119; Loomis v. Loomis, 28 Ill. 454; Green v. Drummond, 31 Md. 81; Carleton v. Rivers, 54 Ala. 469; Page v. Page, 8 N. H. 187; Barnard v. Jewett, 97 Mass. 87; Conner v. Lewis, 16 Me. 268.

[4] Niver v. Crane, 98 N. Y. 47; Harvey v. Pennypacker, 4 Del. Ch. 445; Cutler v. Tuttle, 19 N. J. Eq. 562; Buck v. Swazey, 35 Me. 41.

[5] Rogers v. Murray, 3 Paige (N. Y.), 390; McCarroll v. Alexander, 48 Miss. 136; French v. Sheplor, 83 Ind. 247.

[6] White v. Carpenter, 2 Paige (N. Y.), 217; Byers v. Danley, 27 Ark. 89.

[7] Statutes modifying the doctrine of the text have been enacted in Indiana, Kansas, Kentucky, Michigan, Minnesota, New York and Wisconsin, with possibly some other states.

§ 16. Conveyance taken by one where consideration is paid by another. The most common as well as the most important class of resulting trusts which arise in the ordinary relations of vendor and purchaser is that which is created where one buys land in the name of another and pays the purchase price. In all such cases a trust at once arises in favor of the person so paying the consideration, the grantee of the legal title holding it as a trustee for him.[1] The evidence to sustain such trust must always be clear, and it has been said must always be received with great caution;[2] yet where the trust is clearly and satisfactorily proved, equity is required to enforce it.[3] Yet, as previously remarked, such trust being founded solely on presumptive intention, and designed simply to carry that intention into effect, it follows that if such intention did not exist the trust will not attach in favor of the person paying the purchase money merely by reason of that circumstance.[4]

The principle upon which the trust is founded is that the estate belongs to the party who advances the money out of his own funds and on his own account to pay for it; and the nominal grantee, who receives the title without paying or incurring any liability to pay any part of the consideration money, is looked upon, as in truth he is, as the mere conduit or channel through which the estate and the title and interest in it pass from the grantor to the real purchaser who pays the consideration for it.[5]

The trust which results to the purchaser by operation of

[1] Lehman v. Lewis, 62 Ala. 129; Hampson v. Fall, 64 Ind. 382; Case v. Codding, 38 Cal. 191; Murphy v. Peabody, 63 Ga. 522; Brooks v. Shelton, 54 Miss. 353; Du Valle v. Marshall, 30 Ark. 230; Boskowitz v. Davis, 12 Nev. 446; Baker v. Vining, 30 Me. 121; Pinnock v. Clough, 16 Vt. 500; Scheerer v. Scheerer, 109 Ill. 11; Foote v. Calvin, 3 Johns. (N. Y.) 216; Plummer v. Jarman, 44 Md. 639; Smitheal v. Gray, 1 Humph. (Tenn.) 491.

[2] Mahoney v. Mahoney, 65 Ill. 406; Thomas v. Standiford, 49 Md. 181; Hyden v. Hyden, 6 Baxt. (Tenn). 406.

[3] Scheerer v. Scheerer, 109 Ill. 11.

[4] Byers v. Danley, 27 Ark. 89; White v. Carpenter, 2 Paige (N. Y.), 217; Page v. Page, 8 N. H. 187.

[5] So far has this principle been carried that courts of law have held that such interests are salable by execution against the *cestui que trust*, and that the right of possession and legal estate may be recovered in an action of ejectment or writ of right against the trustee on the ground that the trust is executed by the statute of uses and the estate itself vested in the beneficiary.

law must be a pure, unmixed trust of the ownership and title of the land or estate itself, and not an interest in the proceeds of the land, or a lien upon it as a security for an advance or other demand, or an equity or right to a sum of money to be raised out of the land or upon the security of it. "These rights," says Jones, C., "are the subjects of the contracts or agreements of parties, and may form the substance of express trusts; but they require for their subsistence that the title and legal estate of the premises which yield the aliment that sustains them should reside not nominally but potentially in the trustee. They are not fit objects, therefore, for implied trusts; they are too complex and partake too much of the nature of contracts to belong to the class of pure and simple trusts, the sole operation of which is to vest the estate in the actual purchaser in exclusion of the nominal grantee, and not to regulate the equitable rights and interests of those for whose benefit the legal owner may be under a moral obligation to hold or apply it."[1]

§ 17. **Continued — Payment must be of the whole or some aliquot part of the consideration.** As a rule, no trust will be raised by implication or result to the person advancing money unless he has paid the entire consideration or some definite part thereof, as one-half, one-third, or the like;[2] a general contribution of a sum of money towards an entire purchase is not sufficient.[3] This principle remains unshaken in England, and has often been acted upon in our own courts; and the rule as deduced from the authorities would seem to be that, while there may be a trust of a part only of the estate by implication of law, it must be of an aliquot part of the whole interest in the property. The *cestui que trust* or the person to whom the trust results must become, by the operation of law upon the estate, a tenant in common with the grantee of the whole interest vested in him by the grant; and if the portion of the purchase money furnished by the party claiming the benefit of the trust is not an aliquot part of the whole, or unless the money so advanced is shown to have been paid for

[1] White v. Carpenter, 2 Paige (N. Y.), 217.

[2] Billings v. Clinton, 6 S. C. 102; Sayre v. Townsend, 15 Wend. 651.

[3] Bibb v. Hunter, 79 Ala. 361; Wheeler v. Kirtland, 23 N. J. Eq. 22; Olcott v. Bynum, 17 Wall. (U. S.) 44.

some specific part or distinct interest in the estate, there is no resulting trust corresponding with the portion or amount of the purchase money paid.[1] There can be no resulting trust of the whole estate to a given extent of the value of it, leaving the residuum, if any, of the value to the grantee; nor can an estate result to the party who pays the consideration as a pledge or security for the money so paid, and on the repayment to return to and vest in the nominal grantee.[2]

§ 18. Purchase by fiduciaries. In accordance with the principles stated in the preceding paragraphs, if a person clothed with a fiduciary character employs the moneys intrusted to him in the purchase of property, the title to which he takes in his own name and in his individual capacity, a trust is immediately raised in favor of his beneficiary.[3] This principle is not confined to any particular class of trustees, but is general to all persons standing in a fiduciary relation to others. It applies to executors,[4] guardians,[5] conservators,[6] or to any agent or representative of another who uses the funds of his principal.[7]

§ 19. Joint purchase in name of one. Where real estate is purchased by two or more, but the deed is only made to one of such joint purchasers, a resulting trust is raised in favor of the others, and parol evidence is admissible to prove the facts.[8] If the payments are equal, each paying one-half the price in the case of two, a resulting trust will arise in favor of the other as to an undivided half of the land;[9] and it has been held that, in the absence of proof, the presumption is that the purchasers

[1] Robles v. Clarke, 25 Cal. 326; Wheeler v. Kirtland, 23 N. J. Eq. 22; Buck v. Swazey, 35 Me. 41.

[2] White v. Carpenter, 2 Paige (N. Y.), 217.

[3] Hancock v. Titus, 33 Miss. 224; McLaren v. Brewer, 51 Me. 402; Neill v. Keese, 13 Tex. 187; Tilford v. Torrey, 53 Ala. 122.

[4] Dodge v. Cole, 97 Ill. 338; Barker v. Barker, 14 Wis. 131; Harper v. Archer, 28 Miss. 212; Robinson v. Robinson, 44 Ala. 236.

[5] Coles v. Allen, 64 Ala. 98; Brayles v. Nowlin, 59 Tenn. 191.

[6] Stratton v. Dialogue, 16 N. J. Eq. 70; Hammett's Appeal, 72 Pa. St. 337.

[7] Cookson v. Richardson, 69 Ill. 137; Brown v. Dwelley, 45 Me. 52; Church v. Sterling, 16 Conn. 388.

[8] Morey v. Herrick, 18 Pa. St. 129; Buck v. Swazey, 35 Me. 41; Powell v. Mfg. Co. 3 Mason (C. Ct.), 347; Case v. Codding, 38 Cal. 191; Smith v. Smith, 85 Ill. 189; Clark v. Clark, 43 Vt. 685; Dow v. Jewell, 18 N. H. 340; Thomas v. Thomas, 62 Miss. 531; Frederick v. Haas, 5 Nev. 389.

[9] Smith v. Smith, 85 Ill. 189.

paid equal amounts,[1] while if the amounts advanced are unequal, the purchaser taking the deed in his own name will be held to hold the land so acquired in trust for the person whose money has been used in the proportion it bears to the entire consideration paid.[2]

§ 20. Fraudulent grantee, when a trustee. It is among the best settled principles of equity that a court of chancery will relieve against fraud in the transfer of land by converting the person guilty of it into a trustee for those who have been injured thereby.[3] Hence, where a conveyance is obtained under circumstances of fraud or oppression, the party deriving title will be converted into a trustee in case that construction is needed for the purpose of administering adequate relief; and while the general rule is that a trust can only be proved by a writing, yet the setting up of the statute against frauds by the guilty party, in order to bar interference with his wrong-doing, will not in such case hinder the court from forcing on his conscience this character as a means to baffle his injustice or its effects.[4]

§ 21. Purchase in name of wife or children. The general rule that if a man purchases land, but does not take the conveyance in his own name, the trust of the legal estate nevertheless results to him if he advances the purchase money, is subject to some qualification and exceptions, the most important being where such purchase is made in the name of wife or children.

In a case where a father purchases in the name of a child, it will not usually be deemed a resulting trust for the father, but a gift or advancement for the child.[5] The moral obligation of a parent to provide for his children is said to be the

[1] Shoemaker v. Smith, 11 Humph. (Tenn.) 81.

[2] Springer v. Springer, 114 Ill. 550; Kelley v. Jenness, 50 Me. 455; Hall v. Young, 37 N. H. 134; Case v. Codding, 38 Cal. 191.

[3] Brown v. Lynch, 1 Paige (N. Y.), 147; Huxley v. Rice, 40 Mich. 82; Rutherford v. Williams, 42 Mo. 31; Wolford v. Harrington, 74 Pa. St. 311.

[4] Huxley v. Rice, 40 Mich. 82.

[5] Page v. Page, 8 N. H. 187; Knouff v. Thompson, 16 Pa. St. 357; Fatheree v. Fletcher, 31 Miss. 265; Tremper v. Burton, 18 Ohio, 418; Dudley v. Bosworth, 10 Humph. (Tenn.) 12; Cartwright v. Wise, 14 Ill. 417; Gray v. Gray, 13 Neb. 453; Groff v. Rohrer, 35 Md. 327; Wallace v. Bowens, 28 Vt. 638.

foundation of this exception, or rather of this rebutter of a presumption; since it is not only natural but reasonable to presume that a parent, by purchasing in the name of a child, means a benefit to the latter in discharge of this moral obligation, and also as a token of parental affection.[1] It has been held that the presumption of an advancement may be rebutted whenever it appears that the parent intended that the conveyance should not be considered as such, and that in such case the child would take only as trustee;[2] but usually the rule as first stated will prevail, and a parent will be estopped from claiming a resulting trust in conveyances which he has caused to be made to his children. This is particularly true where such children are infirm or otherwise incapacitated and the policy of the law requires that such an advancement so made should be held irrevocable by the father. A contrary rule, as has been well said, would open too wide a door for the revocation of advancements to those who have a special and peculiar claim upon the bounty and protection of a father.[3]

So, too, a purchase by a husband in the name of his wife is also deemed an advancement and provision for her,[4] and it has been said that the presumption is stronger in the case of a wife than in that of a child.[5]

A purchase in the name of wife or child may, of course, be fraudulent as against the creditors of the husband and father; but this is a phase of the question not under consideration in this connection.[6]

§ **22. Voluntary conveyance.** No trust will result to the grantor of a voluntary conveyance, whatever may have been the unexpressed and secret intentions of the parties,[7] and parol evidence is inadmissible to contradict the expressed consideration for the purpose of defeating the operation of the convey-

[1] Whitten v. Whitten, 3 Cush. (Mass.) 191.

[2] Fleming v. Donahoe, 5 Ohio, 255.

[3] See Cartwright v. Wise, 14 Ill. 417.

[4] Dickenson v. Davis, 43 N. H. 647; Wallace v. Bowens, 28 Vt. 638; Garfield v. Haymaker, 15 N. Y. 475; Shepard v. White, 10 Tex. 72; Sunderland v. Sunderland, 19 Iowa, 325; Alexander v. Warrance, 17 Miss. 228.

[5] 2 Story, Eq. § 120.

[6] See chapter XXV, "Fraudulent Conveyances."

[7] Groff v. Rohrer, 35 Md. 327; Burt v. Wilson, 28 Cal. 632; Titcomb v. Morrill, 10 Allen (Mass.), 15; Miller v. Wilson, 15 Ohio, 108; Rasdall v. Rasdall, 9 Wis. 379.

ance;[1] while the covenants, if the deed is made with warranty, will estop the grantor from asserting an interest in the property sufficient to raise a resulting trust in his favor.[2]

§ 23. Loans — Title taken as security. Where a purchase is made by the grantee in the deed and with his own money, no trust can usually result to any other person; yet if it appears that such grantee, by way of loan, and wholly upon the credit and account of another, has advanced the purchase money and taken title to himself as security for its repayment, he would hold the estate upon a resulting trust for such other, and on repayment would be compelled to convey.[3] The only question in such case is as to the loan, and if this is established by competent evidence the rule is the same as if the *cestui que trust* had actually advanced the money himself.[4]

Payment of the purchase money by way of loan to the nominal purchasers creates no resulting trust,[5] although some of the cases seem to hold that if money is advanced with the intention of such application a trust may arise.[6]

§ 24. Parol evidence to show resulting trust. The rule is fundamental that a trust in land can only be established by some writing duly signed, and that parol evidence is inadmissible for this purpose. But in the case of trusts resulting by operation of law an important exception is made, induced by the necessities of the case, and the trust may be established by parol.[7] The fact that the deed acknowledges the consideration to have been paid by the nominal grantee is immaterial.[8]

[1] Farrington v. Barr, 36 N. H. 86; Philbrook v. Delano, 29 Me. 410; Blodgett v. Hildreth, 103 Mass. 484.

[2] Philbrook v. Delano, 29 Me. 410.

[3] Northrup v. Metcalf, 11 Paige (N. Y.), 576; Lehman v. Lewis, 62 Ala. 133; Dryden v. Hanway, 31 Md. 263; Buck v. Pike, 11 Me. 9.

[4] Boyd v. McLean, 1 Johns. Ch. (N. Y.) 582.

[5] Pinnock v. Clough, 16 Vt. 500; Case v. Codding, 38 Cal. 193; Fickett v. Durham, 109 Mass. 422.

[6] See Robinson v. Robinson, 44 Ala. 246; Boyd v. McLean, 1 Johns. Ch. (N. Y.) 582.

[7] Kane v. O'Conners, 78 Va. 76; Wits v. Horney, 59 Md. 584; McCartney v. Bostwick, 32 N. Y. 59; Pritchard v. Brown, 4 N. H. 397; Livermore v. Aldrich, 5 Cush. (Mass.) 431; Kelley v. Hill, 50 Me. 470; Andrews v. Jones, 10 Ala. 401; Cotten v. Wood, 25 Iowa, 43; Millard v. Hathaway, 27 Cal. 119; Lloyd v. Carter, 17 Pa. St. 216; Ward v. Armstrong, 84 Ill. 151.

[8] Boyd v. McLean, 1 Johns. Ch. (N. Y.) 582; Page v. Page, 8 N. H. 187; Perkins v. Nichols, 11 Allen (Mass.), 542.

But unless the trust arise on the face of the deed itself the proofs must be clear and convincing,[1] and when parol evidence is alone relied upon, long and unexplained delay in enforcing the trust is a material circumstance against its establishment.[2] It would seem that in England it is doubtful whether parol evidence is admissible against the answer of the trustee denying the trust;[3] but no such doubts can exist in the United States, as the doctrine is fully established that such evidence is admissible to show all the facts out of which the trust arises, not only against the face of the deed itself, but in opposition to the answer of the trustee denying the trust.[4]

The fact and manner of paying the purchase money may be shown by parol, even after the death of the nominal purchaser,[5] although the cases uniformly show that the courts have been deeply impressed with the danger of this kind of proof, which, when admitted, must be received with the highest degree of caution.[6]

In a very few instances this doctrine has been denied, and no trust is permitted to result to a third person unless the facts establishing it appear upon the face of the deed;[7] yet, where this rule prevails, special legislation has either abolished resulting trusts or fixed the method of their creation, so that such decisions, while denying the doctrine, in no proper sense militate against the propositions first stated.[8] So, too, in some states, while the trust is recognized it does not result by implication, but must be established by an agreement that the

[1] Kendall v. Mann, 11 Allen (Mass.), 15; Clark v. Quackenbos, 27 Ill. 260; Monroe v. Graves, 23 Iowa, 597; Carey v. Callan, 6 B. Mon. (Ky.) 44; Dudley v. Bachelder, 53 Me. 403; Browner v. Staup, 21 Md. 328; Rutherford v. Williams, 42 Mo. 31; Durfee v. Pavitt, 14 Minn. 430.

[2] Sunderland v. Sunderland, 19 Iowa, 325; Brown v. Guthrie, 27 Tex. 610; Best v. Campbell, 62 Pa. St. 478.

[3] 2 Sugd. Vend. 435.

[4] Boyd v. McLean, 1 Johns. Ch. (N. Y.) 582; Page v. Page, 8 N. H. 187; Lloyd v. Lynch, 28 Pa. St. 419; Vandever v. Freeman, 20 Tex. 333; Paine v. Wilcox, 16 Wis. 202; and see Babcock v. Wyman, 19 How. (U. S.) 300.

[5] Boyd v. McLean, 1 John. Ch. (N. Y.) 582; Neill v. Keese, 5 Tex. 23; Fausler v. Jones, 7 Ind. 277; Livermore v. Aldrich, 5 Cush. (Mass.) 435.

[6] Boyd v. McLean, 1 John. Ch. (N. Y.) 582.

[7] Groesbeck v. Seeley, 13 Mich. 329.

[8] See Russell v. Allen, 10 Paige (N. Y.), 250; Siemon v. Schurck, 29 N. Y. 598; Maynard v. Haskins, 9 Mich. 485.

title shall be held for the use of the person advancing the purchase money.[1]

§ 25. **Parol proof in rebuttal.** Whenever an equity is set up or founded by parol proof, it may be rebutted, put down or discharged by parol proof; and this rule applies fully to a resulting trust.[2] Thus, it may be shown that the lands in which the estate is claimed were a gift and advancement to the grantee, and were not purchased on account of or for the benefit of the person paying the consideration money.[3]

§ 26. **Removal or substitution of trustees.** Where a trustee is dead, the trust being still alive and unexecuted, a court of equity will carry it out if necessary through its own officers and agents,[4] and may appoint a new trustee,[5] it being a rule in equity that a trust shall never fail for want of a trustee; and it seems that in some states, even where the trust deed contains a power of appointment in the event of the death of the trustee without executing the trust, the *cestui que trust* cannot appoint a new trustee, but the exercise of this right devolves exclusively on a court of chancery.[6] A trustee may always be removed in the discretion of the court upon proper cause shown.[7]

§ 27. **Reservation of verbal and secret trusts.** In a large majority of the cases of voluntary conveyances there is a secret agreement or understanding between the parties that upon the happening of certain contingencies, or upon the request of the vendor, the vendee will reconvey; or, in other words, the vendee takes the property charged with an express trust. But unless this trust is evidenced by some writing signed by the party declaring the same, it is wholly invalid and

[1] See Glidewell v. Spaugh, 26 Ind. 319.

[2] Whiting v. Gould, 2 Wis. 552.

[3] Feller v. Feller, 2 Wend. (N. Y.) 468.

[4] Batesville Institute v. Kauffman, 18 Wall. (U. S.) 120; Buchan v. Hart, 31 Tex. 647.

[5] Curtis v. Smith, 60 Barb. (N. Y.) 9; Hunter v. Vaughan, 24 Gratt. (Va.) 400.

[6] Guion v. Pickett, 42 Miss. 77. As a general rule a court of chancery has jurisdiction to control the exercise of the power of appointment when vested in an individual; so far, at least, as to prevent an abuse of discretion. Bailey v. Bailey, 2 Del. Ch. 95.

[7] Attorney-General v. Garrison, 101 Mass. 223; Scott v. Rand, 118 Mass. 215; Ketchum v. R. R. Co. 2 Woods (C. Ct.), 532.

incapable of effect. As already remarked, the policy of the law will not permit the vendor to plead his own fraud; and although a resulting trust is often permitted where one acquires title which rightfully belongs to another, and such trust will be enforced in the interests of equity and good conscience, yet in cases similar to those under consideration the trust becomes express; and where there is an express trust there cannot be a resulting or implied trust,[1] while a voluntary conveyance is never held to creat a resulting trust for the grantor.[2]

Where a conveyance is colorable merely, and a secret trust and confidence exists for the benefit of the grantor, the conveyance will be void both as against precedent and subsequent creditors.[3]

[1] Kingsbury v. Burnside, 58 Ill. 310.

[2] Jackson v. Cleveland, 15 Mich. 94; Stevenson v. Crapnell, 114 Ill. 19.

[3] Jones v. King, 86 Ill. 225; Hook v. Mowre, 17 Iowa, 197; Hildreth v. Sands, 2 Johns. Ch. (N. Y.) 46.

CHAPTER XXIV.

POWERS.

§ 1. General rules and principles.
2. Power given to several.
3. Powers of attorney.
4. By several persons.
5. Construction.
6. The subject-matter.
§ 7. Defective execution of power.
8. Registration of power.
9. Power of infant.
10. Power of lunatic.
11. By husband and wife.
12. Revocation.

§ 1. General rules and principles. A power has been defined as the right, ability or faculty of performing some act, and is technically used to designate an authority by which one person enables another to do some act for him. In the various relations which subsist between vendor and purchaser powers have long sustained an important position; and, notwithstanding the many radical and sweeping changes that have occurred in the law of uses and trusts, they still continue to be used as potent factors in the transfers of estates and the devolution of title.

Powers are classed generally as *inherent* and *derivative;* the former being enjoyed by their possessors as of natural right, while the latter are such as are received from another. It is with the latter class only that this chapter has to treat, as this division includes all the powers technically so called.

In technical parlance the person bestowing a power is called the *donor;* the person receiving it the *donee;* and while these terms are constantly employed in speaking of powers under the statute of uses, yet with respect to powers which are intended only as delegations of authority, and which practically create the relation of principal and agent, these latter terms are more generally used.

A very common example of a power is that presented by the delivery of a letter or warrant of attorney, and the power thus conferred is what is usually styled a naked power. This consists of a simple right of authority disconnected from any interest of the donee or agent in the subject-matter. But the power may consist of a right or authority to do some act, to-

gether with an interest in the subject on which the power is to be exercised; in which case it is said to be coupled with an interest. This occurs whenever the power or authority is connected with an interest in the thing itself actually vested in the agent; it must not, however, be merely an interest in that which is produced by the exercise of the power, but the power and the estate must be united or be co-existent.[1]

Powers which derive their operation through the statute of uses are authorizations which enable a person through the medium of the statute to dispose of an interest in real property, vested either in himself or another. They formerly constituted a very elaborate and intricate system in connection with uses and trusts, but modern legislation has greatly narrowed their scope and confined their operation to a comparatively narrow channel. They are said to be *appendant* where the donee is authorized to exercise out of the estate limited to him the privilege of making grants; and *in gross* where the donee, who has an estate in the land, is given authority to create such estates only as will not attach on the interest limited to him or take effect out of his own interest. Powers of *appointment* are those which go to create new estates, and are distinguished from powers of *revocation*, which are to divest or abridge an existing estate. Such powers are also divided into *general*, being those by which the donee is at liberty to appoint whomsoever he pleases, and *special*, or those in which the donee is restricted to an appointment to or among particular persons only. These powers may be created by deed, but are more generally raised by wills or testamentary writings.

§ 2. **Power given to several.** When a power is given to several persons, if it is a mere naked power to sell or convey, the general rule is that it must be executed by all, and does not survive;[2] but where it is coupled with a trust, notwithstanding a renunciation by one or more of the trustees, the other or others will take the power as if it were originally given only to them.[3]

[1] Walker v. Denison, 86 Ill. 142; Gilbert v. Holmes, 64 Ill. 548.

[2] Peter v. Beverly, 10 Pet. (U. S.) 532.

[3] Clark v. Hornthal, 47 Miss. 527; Putnam School v. Fisher, 30 Me. 523; Osgood v. Franklin, 2 Johns. Ch. (N. Y.) 1; and see Mansfield v. Mansfield, 6 Conn. 559.

§ 3. Powers of attorney. Any instrument authorizing a person to act as the agent or attorney of the person granting it is technically a power of attorney, and under requests and authorizations of this kind many sales and conveyances are daily accomplished. They are *general*, as when the agent is authorized to perform all necessary acts on behalf of the principal, or *special*, as when the power is limited to a particular act or series of acts. When made without words of conveyance, simply authorizing a conveyance to be made upon certain conditions and for certain purposes, they vest no interest in the donee.[1]

A power of attorney to sell and convey, under which a conveyance of land is made, must be in writing and of equal dignity with the deed executed in order to be valid at law.[2] It must possess the same requisites as are necessary in a deed directly conveying the lands.[3]

§ 4. By several persons. A power of attorney created by two or more persons possessing distinct interests, while it may be so limited as to prevent a sale of the interests of either separately, yet if given in general terms, without qualifying words or other circumstances restraining the authority of the attorney, will be construed as a power to sell and convey the interests of each, either jointly with the interests of the others or by a separate instrument.[4]

§ 5. Construction. A power of attorney should, as a general rule, be strictly construed, and the authority should not be extended beyond that which is given in terms, or which is necessary and proper for carrying the authority given into full effect.[5] In this respect they differ from powers of appointment created by deed or will, or from those powers which were introduced in connection with uses. In this latter class courts of equity have generally indulged in very liberal interpretations of words, and held many executions of such powers valid which would scarcely be allowed in the construction of words employed in the ordinary powers of attorney to sell land, execute a deed, make a contract, or manage any particu-

[1] Thorp v. Brenneman, 41 Iowa, 251.

[2] Watson v. Sherman, 84 Ill. 263.

[3] Clark v. Graham, 6 Wheat. (U. S.) 577.

[4] Halladay v. Daily, 18 Wall. (U. S.) 606.

[5] Pool v. Potter, 63 Ill. 533; Clark v. Courtney, 5 Pet. (U. S.) 319.

lar business, with instructions more or less specific, according to the nature of the case. Yet the rule does not require a construction that will defeat the intention of the parties; and when that intention fairly appears from the language, such intention, as in other instruments in writing, should be permitted to control.[1] In general, however, powers of attorney and all special powers are to be construed strictly, and the general words are to be construed in reference to the particular terms which form the subject-matter of the instrument, in furtherance of, but in subordination to, the general power conferred.[2]

A power of attorney to sell land includes also the power to contract to sell, as well as to convey or transfer the property;[3] but this is generally the full limit of the attorney's power under a general authorization. He cannot subdivide the land nor lay the same off into lots so as to vest the fee of streets in the municipality for the use of the public; nor does it authorize him to make a partition.[4] So, also, a power to sell and convey does not, as a general rule, confer a power to mortgage; and a mortgage executed under a power authorizing the attorney to sell and convey is void.[5] Nor will a power to "sell" thereby authorize the attorney to make an exchange either for land or merchandise.[6] A power of attorney authorizing the agent to "buy and sell" land, and to receive and execute all necessary contracts and conveyances therefor, does not authorize the attorney to sell and convey lands to which the principal had acquired title before the execution of the power;[7] and where a power is limited as to time it must be exercised within the time specified.[8] Where a power is given to sell at auction it cannot be executed in any other manner.[9]

A power to sell, so far as it gives directions as to persons, must be strictly pursued.[10]

[1] Hemstreet v. Burdick, 90 Ill. 444; Guion v. Pickett, 42 Miss. 77.

[2] Geiger v. Bolles, 1 Thomp. & C. (N. Y.) 129.

[3] Hemstreet v. Burdick, 90 Ill. 444.

[4] Gosselin v. Chicago, 103 Ill. 623.

[5] Morris v. Watson, 15 Minn. 212.

[6] Lumpkin v. Wilson, 5 Heisk. (Tenn.) 555.

[7] Greve v. Coffin, 14 Minn. 345.

[8] Clements v. Macheboeuf, 92 U. S. 418.

[9] Greenleaf v. Queen, 1 Pet. (U. S.) 138.

[10] Williams v. Peyton, 4 Wheat. (U. S.) 77.

§ 6. **The subject-matter.** While the terms of a power of attorney must clearly and succinctly set forth the authority of the attorney, defining his duties and the extent of his powers, and usually the method in which they shall be exercised, yet, unlike deeds, it is not necessary, unless the power is limited to certain parcels, that the land should be particularly described; and a power authorizing the attorney in fact to sell all the real estate of the principal situated in a certain city, county or state is valid and effectual without a particular description of the property owned by the principal.[1]

§ 7. **Defective execution of power.** As a rule the entire failure to execute a mere power not amounting to a trust will not be aided in equity;[2] but where a party properly clothed with a power has begun to exercise it, any error or mistake will be regarded as a defective execution which equity may remedy.[3] This is always the case with respect to purchasers for a valuable consideration, as well as others whose claims are founded in merit.[4] Hence, if an attorney, in the due exercise of the power given him by his principal, execute a deed in his own name instead of that of his principal, while such deed would be without effect at law, yet it is competent for a court of equity to aid and complete the defective execution thus made by the agent, and establish the legal title to the land. Such deed would have effect in equity as a valid sale, and be sufficient to pass to the purchaser and his assigns an equitable title.[5]

[1] Roper v. McFadden, 48 Cal. 346.

[2] Mitchell v. Denson, 29 Ala. 327; Lines v. Darden, 5 Fla. 51; Wilkinson v. Getty, 13 Iowa, 157.

[3] Schenck v. Ellingwood, 3 Edw. Ch. (N. Y.) 175; Gibbons v. Hoag, 95 Ill. 45.

[4] Beatty v. Clark, 20 Cal. 11: Schenck v. Ellingwood, 3 Edw. Ch. (N. Y.) 175.

[5] Pensonneau v. Bleakley, 14 Ill. 15. In Watson v. Sherman, 84 Ill. 263, there was a power to an attorney to sell and convey, which the attorney proceeded to execute by selling and conveying, but the power was not under seal. It was held the power to sell was good without a seal, but the conveyance was invalid because of the want of a seal to the power. And it was also held that, notwithstanding the defective deed, the purchaser at the sale obtained an equitable title which would be conclusive in all proceedings in a court of equity. So in Schenck v. Ellingwood, 3 Edw. Ch. (N. Y.) 175, where the writing authorizing the sale was not executed in the presence of two witnesses, but was executed in the presence of one witness only. *Held*, that the omission of another or second witness to the deed of appointment was at most but a defective execution, which

§ 8. **Registration of power.** As registration is not essential to the validity of a deed or to the vesting of title thereunder, so neither is it of obligatory importance that the power under which such a deed may have been executed should also be placed on record. But the principles which apply to registration of deeds have the same force with respect to powers of attorney, and the same necessity which induces registration of the former compels a record of the latter. A deed executed by the procuration of an attorney in fact is inseparably connected with the power which conferred such authority, and the two may well be taken and construed as but one instrument, or at least as but parts of one and the same transaction. And the record, to have effect, must be of the identical instrument; for the record of a copy of a power of attorney is without warrant of law and unavailing. The power must accompany the grant upon the records.[1]

§ 9. **Power of infant.** The general rule is that the deed of an infant is not absolutely void, but voidable only; and such deeds, while not encouraged, are often permitted to stand when challenged, and always given efficacy when unquestioned. But the deeds of an infant which do not take effect by delivery of his hand are, on the contrary, not merely voidable but void. Powers of attorney being of this class fall within the inhibition of the rule, and such instruments have repeatedly been held to be without any legal efficacy.[2]

§ 10. **Power of lunatic.** A lunatic or insane person, being of unsound mind, is incapable of executing a contract, deed or other instrument requiring volition and understanding, and hence cannot confer that power upon another by a warrant of attorney. The fundamental idea of a contract is that it requires the assent of two or more minds; but a lunatic or a person *non compos mentis* has nothing which the law recognizes as a mind, and for this reason he cannot make a contract which may have any efficacy as such. Circumstances will sometimes be permitted to vary this rule, and the law will

a court of equity will supply in favor of a purchaser for a valuable consideration.

[1] Oatman v. Fowler, 43 Vt. 462.

[2] Lawrence v. McArter, 10 Ohio, 37; Pyle v. Cravens, 4 Litt. (Ky.) 17; Whitney v. Dutch, 14 Mass. 462; Fonda v. Van Horne, 15 Wend. (N. Y.) 636.

allow a deed or contract to be voidable rather than void when manifest injustice might result from the application of a more strict construction; but the general rule still holds good that a power of attorney of a lunatic, as well as any deed of his which delegates authority but conveys no interest, is wholly void.[1]

The doctrine that a lunatic's power of attorney is void finds confirmation in the analogy which exists between the situation and acts of infants and lunatics. Both of these classes are regarded as under the protection of the law; but a lunatic needs more protection than a minor. The latter is presumed to lack sufficient discretion — reason is wanting in a degree; but with a lunatic it is wanting altogether. It is generally held that the deeds of an infant which do not take effect by delivery of his hand — in which class are placed letters of attorney — are void; and it would follow, therefore, with stronger reason that a letter of attorney of a lunatic should not be merely voidable.

§ 11. By husband and wife. Formerly, in most of the states, a married woman could not, in the absence of statutory authority, execute, either alone or in connection with her husband, a valid power of attorney to convey her interest in real property. This was in conformity to the ancient rule of the common law which provided that her interest in land could only pass by uniting personally in a conveyance with her husband, and acknowledging upon a separate examination apart from him that she executed the conveyance freely without any fear of him or compulsion from him. This private examination was an essential preliminary to the validity of any transfer by her; and as such examination was in its nature personal, it followed that it was a matter in which she could not be represented by another.[2]

§ 12. Revocation. As the power of one man to act for another depends on the will and license of that other, so it naturally follows that the power ceases whenever the will or permission is withdrawn. The general rule, therefore, is that a power of attorney may be revoked at any time by the party who gave it, at his mere pleasure, notwithstanding that by its terms the

[1] Dexter v. Hall, 15 Wall. (U. S.) 28. S.) 606; and see Sumner v. Conant,
[2] Halladay v. Daily, 19 Wall. (U. 10 Vt. 19; Matt v. Smith, 16 Cal. 533.

authority may be expressly declared to be irrevocable.[1] So, too, a revocation may result by operation of law, as by the marriage of the principal, the power having been given while he was a single man;[2] or a conveyance by the principal of the subject-matter of the power before the agent has had an opportunity to dispose of it.[3] It has been held, also, that the insanity of the principal, or his incapacity to exercise any volition upon the subject by reason of an entire loss of mental power, operates as a revocation or suspension, for the time being, of the powers of an agent acting under a revocable power.[4] It would seem, however, that the giving of a second power to another agent without specially revoking the first would not act as a revocation, and if either power is executed both will be exhausted.[5] A power is also revoked by the death of the principal,[6] although this is not so much a revocation as an extinguishment.

But although a power of attorney depends from its nature on the will of the person making it, and may in general be recalled at his will, yet this rule is subject to some modification; for if the principal binds himself for a consideration, in terms or by the nature of the contract, not to change his will, the law will not permit him to change it. Hence, where a letter of attorney forms a part of a contract, or is security for money or for the performance of any act which is deemed valuable, even though it may not be made irrevocable in terms, the law will yet deem it so.[7]

It seems to have been a question of considerable controversy as to whether a power of attorney irrevocable during the life of the constituent will yet retain its efficacy after his death. Ordinarily a power ceases with the life of the person giving it; and it has been contended by high authority that there can be no execution after death, and that the power becomes extinct. The reason assigned is that title can regularly pass out of the person in whom it is vested only by a convey-

[1] Walker v. Denison, 86 Ill. 142; Hunt v. Rousmanier, 8 Wheat. (U. S.) 174; Brown v. Pforr, 38 Cal. 550.

[2] Henderson v. Ford, 46 Tex. 627.

[3] Walker v. Denison, 86 Ill. 142.

[4] Davis v. Lane, 10 N. H. 156.

[5] Cushman v. Glover, 11 Ill. 600.

[6] Clayton v. Merritt, 52 Miss. 353; Davis v. Savings Bank, 46 Vt. 728.

[7] Hunt v. Rousmanier, 8 Wheat. (U. S.) 174.

ance in his own name; and this cannot be executed by another for him when it could not, in law, be executed by himself.

It is, however, a general rule that if a power be coupled with an interest it survives the person giving it and may be executed after his death. This proposition, which has long been positively asserted, may now be regarded as an incontrovertible rule of law; and where the "interest" in the subject on which the power is to be exercised is part and parcel of the thing itself, and not an interest in that which is produced by the exercise of the power, the power will be protected after the death of the person who creates it. But to effect this the power and interest must be united in the same person, and the power must be engrafted on an estate in the land itself.[1]

When a power is revocable at will merely, the general rule

[1] The ideas conveyed in the text may be in some degree illustrated by examples of cases in which the law is clear, given by Marshall, C. J., in Hunt v. Rousmanier, 8 Wheat. (U. S.) 174, which is the leading American case on the subject. The learned justice says, in regard to the exposition of the term "power coupled with an interest:" "If the word 'interest' thus used indicated a title to the proceeds of the sale and not a title to the thing to be sold, then a power to A. to sell for his own benefit would be a power coupled with an interest; but a power to A. to sell for the benefit of B. would be a naked power, which could be executed only in the life of the person who gave it. Yet for this distinction no legal reason can be assigned. Nor is there any reason for it in justice; for a power to A. to sell for the benefit of B. may be as much a part of the contract on which B. advances his money as if the power had been made to himself. If this were the true exposition of the term, then a power to A. to sell for the use of B., inserted in a conveyance to A. of the thing to be sold, would not be a power coupled with an interest, and, consequently, could not be exercised after the death of the person making it; while a power to A. to sell and pay a debt to himself, though not accompanied with any conveyance which might vest the title in him, would enable him to make the conveyance, and to pass a title not in him, even after the vivifying principles of the power had become extinct. But every day's experience teaches us that the law is not as the first case put would suppose. We know that a power to A. to sell for the benefit of B., engrafted on an estate conveyed to A., may be exercised at any time, and is not affected by the death of the person who created it. It is, then, a power coupled with an interest, although the person to whom it is given has no interest in its exercise. His power is coupled with an interest in the thing which enables him to execute it in his own name, and is therefore not dependent on the life of the person who created it."

is that a revocation takes effect, as to the attorney, from the time that it is communicated to him, and as to third persons from the time they have notice of it. The only difficulty in the application of the rule arises out of the question as to what shall amount to such notice. It does not seem to be necessary that personal information should in all cases be brought home to the party to be affected, and a fair deduction from the authorities would seem to be that in every case of asserted revocation the question depends upon its own peculiar circumstances; that there may be facts in the case rendering it improper for a party to deal with the attorney — facts tending to fasten upon him the consequences of notice, though short of personal knowledge; and that if, with the exercise of ordinary caution, he would have been led to the knowledge of the revocation, it is the same as if he possessed it. Indeed, no rule is more explicit than that which requires a party dealing with a special agent to make himself fully acquainted with the extent and limitation of his power. As a result of this rule such party will be held chargeable with notice of the actual condition of that power, where it is contained in a written instrument, at the very time he is entering into a transaction with the agent. He may not depend upon prior knowledge or a previous inspection; for it may, in the interim, have been modified or even canceled, and, as he has a right to its production and inspection at the time, so also will he be bound by it as it exists or appears at the time.[1]

[1] Williams v. Birbeck, Hoff. Ch. (N. Y.) 359.

CHAPTER XXV.

FRAUDULENT CONVEYANCES.

§ 1. General principles.
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4. Subsequent validation of fraudulent grants.
5. When deed permitted to stand as security for sum paid.
6. Purchaser without notice.
7. Purchaser with notice from one who purchased without notice.
8. Purchaser without notice from one who purchased with notice.
9. Must have purchased in good faith.
10. Must have paid value.
11. What constitutes "value."
12. Purchaser with notice.
13. Purchaser by quitclaim.
14. Purchaser from grantee by quitclaim.
15. A debtor may prefer one creditor.
16. When declarations of vendor are evidence against the vendee.
17. Conveyance of the homestead.
18. Heirs of fraudulent grantee.
19. Voluntary conveyances.
§ 20. Operation and effect — As between the parties.
21. Continued — As between the parties and third persons.
22. Conveyances from husband to wife.
23. Continued — Purchaser from wife.
24. Conveyance to wife upon consideration.
25. Conveyance to wife — Consideration paid by husband.
26. Continued — Purchaser from wife.
27. Expenditures and improvements on wife's land by husband.
28. Property paid for with wife's earnings.
29. From parent to child.
30. Parol gifts.
31. Deed made to perfect title of parol gift.
32. Ante-nuptial settlements.
33. Ante-nuptial conveyances in fraud of intended consort — By the wife.
34. Continued — By the husband.
35. Pleading and proof.
36. Effect of adjudication of fraud.

§ 1. General principles. It would seem to be a consequence of that absolute power which a man possesses over his own property that he may make any disposition of it in which he does not interfere with the existing rights of others; and such disposition, if fairly and understandingly made, will be valid for all purposes. The only limitations on this power are those prescribed by law; and these limitations, as a rule, are all founded on the English statutes, passed during the reign of

Elizabeth, and which have been substantially re-enacted in all of the American states.[1]

The subject of fraudulent conveyances has been a fruitful one, if the vast body of case law which it has built up is any criterion; yet the topic, like many others in American jurisprudence, has not been developed in complete harmony, nor have the courts been able to agree in all points, even upon some of the fundamental rules. With respect to previous or existing creditors the general rule would seem to be that all conveyances not made on a consideration deemed valuable in law, or made with a collusive design and intent to delay, hinder or defraud such creditors, are to be deemed void. It seems to have been maintained in some cases that the fraudulent intent in conveyances is always a question of fact,[2] but this is not upheld by the volume of authority, and is opposed to the principle and general purpose of the law.

With respect to subsequent creditors the general rule would seem to be that a conveyance is not void unless actually fraudulent; yet to this as well as to the former rule a flexibility

[1] By the statute (13 Elizabeth, ch. 5) it is enacted that every gift, conveyance, etc., of lands or chattels, or of any profit or charge out of them, by writing or otherwise, and every bond, suit, judgment and execution had or made to or for the intent or purpose to delay, hinder or defraud creditors and others of their just and lawful actions, suits, debts, damages, etc., shall be deemed, only as against those persons, their heirs, successors, executors, administrators and assigns, whose actions, etc., are delayed or defrauded, utterly void, with a *proviso* that this shall not extend to any estate or interest, upon good consideration and *bona fide*, lawfully conveyed or assured to any person not having at the time any manner of notice or knowledge of such fraud. By statute (27 Elizabeth, ch. 4) every conveyance, grant, estate, charge, incumbrance and limitation of uses of, in or out of lands, had or made for the intent and of purpose to defraud such as have purchased or shall purchase the same, or any rent, profit or commodity in or out of them, is only as against those persons, their heirs, etc., and all claiming through them, who have purchased or shall so purchase, for money or other good consideration, utterly void, with a *proviso* that this shall not defeat any conveyance, etc., made upon good consideration and *bona fide*.

At common law, previously to these statutes, every conveyance fraudulent in fact was void as against the interest attempted to be defrauded; but fraud then was always a question of fact for the jury, and only existing and not subsequent creditors and purchasers could avoid such conveyances. See instructive note to Sexton v. Wheaton, 1 Am. Lead. Cas. 51.

[2] This seems to be the rule in New York.

is permitted in application, by which a presumption of good faith on the one hand and of fraud on the other may be raised for the benefit of the parties who may seem entitled thereto.

The statute not only protects creditors but "other persons" as well, and a liberal construction in allowing to persons who are or might be injured by a fraudulent conveyance the character of creditors under this statute has always prevailed.[1] Hence, it has been held to extend to all persons who may have any cause of action or suit, whether *ex contractu* or *ex delicto*.[2]

With respect to purchasers the construction of the statute has been more liberal than in favor of creditors; the former class, not having trusted to the personal responsibility of the grantor, but having advanced money upon a conveyance of specific property and upon the faith of acquiring an immediate title to it, are regarded as having a higher equity than general creditors. With regard to this class the general rule would seem to be that a conveyance voluntarily given or actually fraudulent is void as against subsequent purchasers.

An inquiry into the application of the rules, their limitations and exceptions, if any, together with the rights of the parties derived from or growing out of them, will form the subject of the succeeding paragraphs of this chapter.

§ 2. **Fraud — Of what consisting.** No precise definition of fraud ever has been, and from the peculiar character of the offense probably never will be, formulated; but the fraud upon creditors "and others" as contemplated by the statute consists in the intention to prevent them from recovering their just debts and demands by an act which withdraws the property of the debtor beyond their reach.[3]

[1] A party bound by a contract in virtue whereof he may become liable to the payment of money, although his liability may be contingent, is a debtor within the meaning of the statute avoiding all gifts so made to delay, hinder or defraud creditors. Van Wyck v. Seward, 18 Wend. (N. Y.) 375.

[2] Gebhart v. Mufeld, 51 Md. 322. It has been held to embrace demands arising out of slander, trespass and other torts (Jackson v. Meyers, 18 Johns. (N. Y.) 425; Lillard v. McGee, 4 Bibb (Ky.), 165); and that a deed to defeat a judgment in tort is fraudulent (Johnson v. Wagner, 76 Va. 587); as is also a conveyance to prevent the collection of a judgment afterwards recovered in an action for a breach of promise. Hoffman v. Junk, 52 Wis. 613.

[3] McKibbin v. Martin, 64 Pa. St. 352; Alabama Ins. Co. v. Pettway, 24 Ala. 544.

It is often said, and indeed may fairly be considered as a rule, that fraud must be proved, and is never to be presumed. It is contended, however, that this is true only when understood as affirming that a contract or other conduct apparently honest and lawful must be treated as such until it is shown to be otherwise, and that fraud may be inferred from facts calculated to establish it. It is further said that fraud should be so inferred when the facts and circumstances are such as to lead a reasonable man to the conclusion that an attempt has been made to withdraw the property of the debtor from the reach of his creditors with intent to prevent them from recovering their just debts; and that if *prima facie* such fraudulent attempt is thus established, it may be regarded as conclusively established unless it is rebutted by facts and circumstances which are proven.[1]

If the grantor is indebted at the time a transfer is made without consideration or upon a wholly inadequate consideration, the right of an existing creditor to impeach it is undoubted; for every voluntary alienation of his property by an embarrassed debtor is presumptively fraudulent against existing creditors. The very fact of indebtedness raises a presumption of fraud,[2] which becomes conclusive upon insolvency.[3]

[1] Burt v. Timmons, 29 W. Va. 441: Kaine v. Weigley, 22 Pa. St. 179. "A resort to presumptive evidence," observes Black, C. J., in the case last cited, "becomes absolutely necessary to protect the rights of honest men from this or from other invasions. . . . Fraud in the transfer of lands may be shown by the same amount of proof which would establish any other fact in its own nature as likely to exist. In any case, the number and cogency of the circumstances from which guilt is to be inferred are proportioned to the original improbability of the offense. The frequency of fraud upon creditors, the supposed difficulty of detection, the powerful motives which impel an insolvent man to conceive it, and the plausible casuistry with which it is sometimes reconciled to the consciences even of persons whose previous lives have been without reproach,— these are the considerations which prevent us from classing it among the grossly improbable violations of moral duty; and therefore we often presume it from facts which may seem slight. Besides, when a man who shows himself unable to pay his debts disposes of his property for a just purpose, he can easily make and produce the clearest evidence of its fairness. . . . It is no hardship upon an honest man to require a reasonable explanation of every suspicious circumstance; and rogues are not entitled to a veto upon the means employed for their detection."

[2] Pepper v. Carter, 11 Mo. 543; Rose v. Brown, 11 W. Va. 134.

[3] Driggs Bank v. Norwood, 50 Ark. 42.

§ 3. **Conveyance on secret trust.** The rule is well established that one person cannot convey real estate to another, to be held wholly or in part in secret trust for himself, so as to cut off the rights of existing creditors; and where a conveyance is colorable merely, and an undisclosed confidence exists for the benefit of the grantor, the conveyance, as a rule, will be void both as against precedent and subsequent creditors.[1]

In such case the existence of fraud is an inference of law,[2] and it is immaterial what motives may have animated the parties if they have so disposed of the property that the necessary effect is to hinder and delay creditors.[3] Nor does it affect the application of the rule that the transaction may be upon a valuable consideration — it still lacks the important element of good faith; for while it professes to be an absolute conveyance on its face, there is a concealed agreement between the parties to it inconsistent with its terms, securing a benefit to the grantor at the expense of those he owes. A trust thus secretly created, whether so intended or not, is a fraud on creditors, because it places beyond their reach a valuable right.[4]

The retention and possession of the property, or receiving the rents and profits thereof, by the grantor after the execution of a deed for the same absolute upon its face, manifests a secret trust in his favor.[5]

So, also, where property has been conveyed in fraud of creditors and subsequently sold, and the proceeds used in the purchase of other land which is held in secret trust for the debtor, the land so held in trust may be reached and subjected to the claims of the creditor.[6]

[1] Jones v. King, 86 Ill. 225; Moore v. Wood, 100 Ill. 451; Hook v. Mowre, 17 Iowa, 197; Hildreth v. Sands, 2 Johns. Ch. (N. Y.) 46; Robinson v. Stewart, 10 N. Y. 195.

[2] Coburn v. Pickering, 3 N. H. 415.

[3] Phelps v. Curts, 80 Ill. 112.

[4] Lukin v. Aird, 6 Wall. (U. S.) 78.

[5] Power v. Alston, 93 Ill. 587.

[6] As where J., being sued for slander, and to defeat any execution therein, conveyed certain real estate to his brother, who gave his bonds for the consideration — $3,000. These bonds were turned over to the grantor's son. Two years afterward this son purchased the property, returning the bonds as and for the consideration. Subsequently the son sold the property in good faith to W., and invested the proceeds in other property in his own name as trustee for the wife and children of J. The latter, until the sale to W., had remained in possession of the property as transferred. An action was

§ 4. **Subsequent validation of fraudulent grants.** While voluntary conveyances usually afford a presumption of fraud, and for most purposes are deemed void as against subsequent purchasers or creditors, yet it seems to have been a principle of long standing and uniform recognition that a deed voluntary or fraudulent in its creation, and voidable by a subsequent purchaser, may become good by matter *ex post facto*.[1] Where such is the case, and the fraudulent intent is abandoned, and the grant confirmed for a good and valuable consideration, it seems that the original taint is purged, and the deed for all intents and purposes becomes legal and absolute.[2]

A distinction is set up in some of the cases, which, while it recognizes and admits the force of the doctrine as just stated, distinguishes its application in respect to deeds fraudulent in fact and such as are only constructively fraudulent. Thus, it has been held that a deed founded in actual and positive fraud, as being made under the influence of corrupt motives and with an intention to cheat creditors or defeat the rights of third persons, may be considered void *ab initio*, and never to have had any lawful existence. The grantee in such a deed, being considered a *particeps criminis*, is not permitted to deduce any right from an act founded on fraud, and the deed itself is considered incapable of confirmation. On the other hand, where a deed is only considered fraudulent by construction of law, as being against the policy or provisions of some

brought by creditors to subject the land held so by the son in trust as aforesaid to the payment of a judgment. *Held*, that it could be reached by a creditor's bill. Johnson v. Wagner, 76 Va. 587.

[1] Sterry v. Arden, 1 Johns. Ch. (N. Y.) 261.

[2] Thomas v. Goodwin, 12 Mass. 140; Harvey v. Varney, 98 Mass. 120; Hutchins v. Sprague, 4 N. H. 469; Sterry v. Arden, 1 Johns. Ch. (N. Y.) 261; Murray v. Riggs, 15 Johns. (N. Y.) 571. Marriage is such a valuable consideration. Harrison v. Trader, 27 Ark. 290; Richardson v. Schultz, 98 Ind. 435; Butterfield v. Stanton, 44 Miss. 36; Prewit v. Wilson, 103 U. S. 24. And it seems that if the grantee in a voluntary deed gains credit by the conveyance, and a person is induced to marry her on account of the provisions made for her in the deed, such conveyance, on the marriage, ceases to be voluntary and becomes good against a subsequent *bona fide* purchaser for a valuable consideration. Sterry v. Arden, 1 Johns. Ch. (N. Y.) 261; and see Bunnell v. Witherow, 29 Ind. 123; Herring v. Wickham, 29 Gratt. (Va.) 628; Andrews v. Jones, 10 Ala. 400.

particular statutes, the rule as first stated is permitted to prevail, and the deed, being voidable only, may be validated by subsequent acts; as where, in the case of a voluntary conveyance, it is supported and made good by a subsequent valuable consideration.[1]

§ 5. When deed permitted to stand as security for sum paid. The rule is that a deed fraudulent in fact is, as respects the rights of third persons, absolutely void, and is not permitted to stand as a security for any purpose of reimbursement or indemnity.[2] Where, however, a deed is sought to be set aside as voluntary and fraudulent against creditors, and there is not sufficient evidence of fraud to induce the court to avoid it absolutely, but suspicious circumstances as to the adequacy of the consideration and fairness of the transaction are shown, the court will not set aside the conveyance altogether, but will permit it to stand as security for the sum actually paid.[3] In cases where the deed is obtained under circumstances only constructively fraudulent, this rule has often been applied, and thus equal justice is measured out to all parties.[4]

The rule finds its most general application where property has been purchased greatly under value, but without any other circumstances to show bad faith or fraudulent intent. The inadequacy of price is regarded as inequitable, and the conveyance is constructively fraudulent in that it tends to divert the property of the grantor from the payment of his debts to the injury of his creditors; yet where no positive bad faith is shown it is eminently just, and in strict accordance with the principles of equity, that while the deed may be impeached so far as it is voluntary, it shall also be sustained to the extent of the consideration actually and in good faith paid.[5]

[1] Murray v. Riggs, 15 Johns. (N. Y.) 571. A fraudulent grantee cannot be held as trustee of the grantor after having paid *bona fide* debts of the grantor to the full amount of the property received. Thomas v. Goodwin, 12 Mass. 140.

[2] Davis v. Leopold, 87 N. Y. 622; Tompkins v. Sprout, 55 Cal. 37; Henderson v. Hunton, 26 Gratt. (Va.) 935.

[3] Boyd v. Dunlap, 1 Johns. Ch. (N. Y.) 478; Short v. Tinsley, 1 Met. (Ky.) 397.

[4] See Ross v. Wilson, 7 Bush (Ky.), 35; Campbell v. Macomb, 4 Johns. Ch. (N. Y.) 526; Aldrich v. Wilcox, 10 R. I. 417; Muirhead v. Smith, 35 N. J. Eq. 312; Coiron v. Millaudon, 19 How. (U. S.) 115; Boynton v. Hubbard, 7 Mass. 112; Taylor v. Atwood, 47 Conn. 508.

[5] Foster v. Foster, 56 Vt. 551; Demarest v. Terhune, 18 N. J. Eq. 532.

§ 6. Purchaser without notice. A *bona fide* purchaser of lands for a valuable consideration, and without notice of any defect of title or outstanding equity, is regarded with much favor in a court of equity.

It is a general principle in courts of equity that where both parties claim by an equitable title the one who is prior in time is deemed the better in right, and that where the equities are equal in point of merit the law prevails. This leads to the reason for protecting an innocent purchaser holding the legal title against one who has the prior equity. A court of equity can act only, it is said, on the conscience of the party; and if he has done nothing that taints it, no demand can attach upon it so as to give any jurisdiction. Strong as a plaintiff's equity may be, it can in no case be stronger than that of a purchaser who has put himself in peril by purchasing a title and paying a valuable consideration without notice of any defect in it or adverse claim to it; and when, in addition, he shows a legal title from one seized and possessed of the property purchased, he has a right to demand protection and relief, which a court of equity imparts liberally. No discovery or relief can be had against him by any one. His adversary must be left to his remedy at law.[1]

§ 7. Purchaser with notice from one who purchased without notice. The same principle which sustains the rule granting protection to a *bona fide* purchaser without notice from a fraudulent grantor also extends to one who with notice purchases from one who was without notice;[2] for otherwise a party who has purchased property in good faith, and without knowledge of its defects, would be deprived of the benefit of selling the same for its full value;[3] and the rule holds good in all cases except where the estate becomes revested in the original party to the fraud, when the original equity will then reattach to it in his hands.[4] There has been much discussion upon

[1] Boone v. Chiles, 10 Pet. (U. S.) 177; Greenwell v. Nash, 13 Nev. 286; David v. Birchard, 53 Wis. 492; Bradley v. Ragsdale, 64 Ala. 558; Reehling v. Beyers, 94 Pa. St. 316.

[2] Craig v. Zimmerman, 87 Mo. 475; Pringle v. Dunn, 37 Wis. 449; McShirley v. Birt, 44 Ind. 382; Allison v. Hagan, 12 Nev. 38; Moore v. Curry, 36 Tex. 668; Griffith v. Griffith, 9 Paige (N. Y.), 315; Funkhouser v. Lay, 78 Mo. 458.

[3] Trulock v. Peeples, 3 Ga. 446; Piper v. Hilliard, 52 N. H. 211.

[4] Ely v. Wilcox, 26 Wis. 91; Church v. Ruland, 64 Pa. St. 432; Allison v. Hagan, 12 Nev. 38. Thus, the rule would not apply to the case of land

the topic, but the law is now definitely settled; and while there are some conflicting decisions with respect to the rights of a purchaser by quitclaim, it would further seem that where a purchaser without notice of fraud conveys to one having notice, notwithstanding such conveyance may be by quitclaim deed, yet, as such deed is competent to pass whatever title the grantor had, if the property was subject to no equities in his hands, it will convey a good title.[1]

Under this principle a purchaser with notice may protect himself by buying in the title of a *bona fide* purchaser without notice,[2] though it would seem that a subsequent purchaser desiring to shelter himself under the first must be the purchaser of the same interest in every respect.[3]

But while a purchaser with notice may protect himself under a purchaser by deed without notice, it seems he cannot do it from one who holds or claims by contract only;[4] for the rule which protects a *bona fide* purchaser for value and without actual notice applies only where such purchaser has acquired

sold by A., with notice of an equity to B. without notice, and then repurchased by A. (Trentman v. Eldridge, 98 Ind. 525); and in such event the original equity would reattach to the title in A.'s hands. Quinn v. Fuller, 7 Cush. (Mass.) 224; Kost v. Bender, 25 Mich. 515. After the assignment of a mortgage which was not recorded, the mortgagee, at the request of the owner of the equity of redemption, and without the knowledge or consent of the assignee, caused the same to be canceled of record. Said owner then executed another mortgage on the premises to mortgagees who had full notice of the facts; they assigned the same to *bona fide* purchasers, who foreclosed the mortgage, and on foreclosure sale the premises were purchased by the mortgagees in the name of an agent or representative, who conveyed the same to a person having full knowledge of the equities of the holder of the original mortgage. In an action to foreclose said mortgage, *held*, that it was a lien prior to the interest of said subsequent mortgagees or the grantee of their agent; that while, upon transfer of the subsequent mortgage to *bona fide* purchasers, it became in their hands a lien prior to that of plaintiff's mortgage, owing to the protection afforded by the recording act, upon purchase of the premises by one acting for the mortgagees plaintiff's equity at once re-attached. Clark v. McNeal, 114 N. Y. 287.

[1] Craig v. Zimmerman, 87 Mo. 475.

[2] A fraudulent grantee of the equity of redemption of land covered by a *bona fide* mortgage may, by buying at the mortgage sale, acquire a title free from taint. Funkhouser v. Lay, 78 Mo. 458.

[3] See Griffith v. Griffith, Hoff. Ch. (N. Y.) 163.

[4] Boone v. Chiles, 10 Pet. (U. S.) 177.

the legal title, and paid value for it, without knowledge of another claim, and where such other claim is an equitable interest only.[1]

§ 8. **Purchaser without notice from one who purchased with notice.** It is a settled rule that if one affected with notice conveys to one without notice, the latter will be protected equally as if no notice ever existed.[2] Hence a *bona fide* purchaser from a fraudulent grantee is entitled to protection against the demands of the creditors of the fraudulent grantor, and if the purchase is made before the creditors acquire a specific lien upon the property purchased the remedial rights of the creditors to have the original fraudulent conveyance set aside are cut off, and the last purchaser will have a complete defense.[3] So, too, a *bona fide* purchaser from a fraudulent grantee, who has neither actual nor constructive notice of the fraud, is entitled to a preference over a subsequent purchaser under a judgment against the fraudulent grantor, if such prior deed is first recorded,[4] and a mortgagee is considered as a purchaser to the extent of his interest in the mortgaged premises.[5]

§ 9. **Must have purchased in good faith.** The primary requisite for the sustenance of every sale of real property made under circumstances tending to show fraud upon the part of the vendor in the acquisition or disposition of the property covered by such sale is that the vendee shall himself be blameless. He must, in the language of the books, be "innocent;" and this point being established, equity will not, in the absence of other invalidating circumstances, interfere to deprive him of his legal advantage or to vitiate the sale by reason of the fraud practiced by his vendor.[6] The first essential ingre-

[1] Vattier v. Hinde, 7 Pet. (U. S.) 252; Butler v. Douglass, 3 Fed. Rep. 612.

[2] Trulnck v. Peeples, 3 Ga. 446; Lee v. Cato, 27 Ga. 637; Wilson v. Land Co. 77 N. C. 445; Bush v. Lathrop, 22 N. Y. 549; Wood v. Chapin, 13 N. Y. 520; Mundine v. Pitts, 14 Ala. 84; Sumner v. Waugh, 56 Ill. 531; Knox v. Silloway, 10 Me. 201; Fallass v. Pierce, 30 Wis. 443.

[3] Erskine v. Decker, 39 Me. 467; Poor v. Woodburn, 25 Vt. 234; Phelps v. Morrison, 24 N. J. Eq. 195; Spicer v. Robinson, 73 Ill. 519.

[4] Ledyard v. Butler, 9 Paige (N. Y.), 132.

[5] Murphy v. Briggs, 89 N. Y. 452; Pierce v. Faunce, 47 Me. 507; Broward v. Hoeg, 15 Fla. 372.

[6] Dickerson v. Evans, 84 Ill. 451; Fulton v. Woodman, 54 Miss. 158;

dient of legal innocence is "good faith" — a term which legal lexicographers, courts and writers have avoided defining, much the same as "fraud" and other words of common daily use; but while no exact definition can be given, it is generally taken to indicate an honest and sincere purpose, and an absence of dishonesty, insincerity, etc.

The want of notice is generally regarded as an essential element of good faith,[1] while payment of the purchase price, together with other acts evincing an honesty and sincerity of purpose, all combine to demonstrate the legal innocence of the purchaser of either actual or constructive fraud. It has been held in England and in some of the American states that notice received after payment but before the delivery of conveyance destroys the good faith of the transaction, which is deemed to be at least constructively fraudulent;[2] but it is difficult to perceive the force of the reasoning upon which these decisions are based, and it is believed that the better and more just rule is laid down in those cases which hold that where the purchaser has paid the consideration for the land without notice of any prior claim, notwithstanding he receives notice prior to the delivery of the conveyance, he is nevertheless, for all intents and purposes, a *bona fide* purchaser, and entitled to all the protection rightfully belonging to that position.[3]

The knowledge on the part of the grantee of the fraudulent intent and design on the part of the grantor, and his participation in the execution of that intent, are essential, therefore, to render the transfer fraudulent as to him;[4] and as fraud is never presumed when the transaction can be reconciled with an apparently honest purpose, it is further essential that the

Nat. Bank v. Fletcher, 44 Iowa, 252; Wilson v. Land Co. 77 N. C. 445.

[1] Tolbert v. Horton, 31 Minn. 521.

[2] Fash v. Ravesies, 32 Ala. 451; Wells v. Morrow, 38 Ala. 125; Osborn v. Carr, 12 Conn. 195; Duncan v. Johnson, 13 Ark. 190; Doswell v. Buchanan, 3 Leigh (Va.), 394 (2d ed.); Blight v. Banks, 6 T. B. Mon. (Ky.) 192.

[3] Leach v. Ansbacher, 55 Pa. St. 85; Phelps v. Morrison, 24 N. J. Eq. 195; Gibler v. Trimble, 14 Ohio, 323. It has been held that a person who, having discovered a flaw in a title to land, purchases the title for speculation, with a view to ousting the possessors, who claim to be the real owners, is not a purchaser in good faith. Wanner v. Sisson, 6 Rep. 566.

[4] Ewing v. Runkle, 20 Ill. 448; Gridley v. Bingham, 51 Ill. 153; Mehlhop v. Pettibone, 54 Wis. 652.

evidence tending to establish the fact of mutual fraud shall be clear and cogent, or of such a character as to leave a rational mind well satisfied that the charge is true.[1] Direct and positive evidence that the grantee is guilty of participation in the fraudulent intent of the grantor is not required, however, in order to avoid the sale, and fraud on the part of the grantee may be shown by facts and circumstances from which it may be inferred.[2] Where the purchaser has notice of such facts as would or should put a man of ordinary prudence upon inquiry, which inquiry, made with ordinary diligence, would have led to a knowledge of the fraudulent purpose or intent of the vendor, a mere denial of fraudulent intent by the purchaser may not avail.

§ **10. Must have paid value.** Not only must a purchaser who seeks to protect himself from outstanding equities have acted in good faith, but he must also have parted with something of value as the consideration of the grant.[3] This must further have been in keeping with the character and situation of the property, for the protection accorded to a *bona fide* purchaser for value will not be given to a vendee for a grossly inadequate consideration; he must have paid a fair price for it,[4] though not necessarily the full value,[5] and the payment must have been made in money or its equivalent.[6] Such consideration must further have been paid at the time of the execution of the deed,[7] or at least before notice of any prior rights or equities;[8] and if there has been a partial payment before such notice the purchaser will be protected to that extent, and for the amount so paid will be entitled to a lien upon the land.[9]

[1] Shinn v. Shinn, 91 Ill. 477.

[2] Bell v. Devore, 96 Ill. 217; Lee v. Swift, 65 Ill. 330; Zuvers v. Lyons, 40 Iowa, 510.

[3] Aubuchon v. Bender, 44 Mo. 560; Gregory v. Whedon, 8 Neb. 377; Warner v. Whittaker, 6 Mich. 133; Barnard v. Campbell, 58 N. Y. 73; Chapman v. Ransom, 44 Iowa, 377.

[4] Nugent v. Jacobs, 103 N. Y. 125.

[5] Worthy v. Coddell, 76 N. C. 82.

[6] Haughwout v. Murphy, 21 N. J. Eq. 118; Kitteridge v. Chapman, 36 Iowa, 348.

[7] Savage v. Hazard, 11 Neb. 327; Stone v. Welling, 14 Mich. 514.

[8] Hutchins v. Chapman, 37 Tex. 612; Palmer v. Williams, 24 Mich. 328; Savage v. Hazard, 11 Neb. 327.

[9] Kitteridge v. Chapman, 36 Iowa, 348; Warner v. Whittaker, 6 Mich. 133; Baldwin v. Sager, 70 Ill. 503; Fessler's Appeal, 75 Pa. St. 483; Digby v. Jones, 67 Mo. 104; Fraim v. Frederick, 32 Tex. 294; Hardin v. Harrington, 11 Bush (Ky.), 367; Farlin v. Sook, 30 Kan. 401.

The general rule above stated seems to be imperative, and it is not sufficient that the purchaser had no notice when he purchased, if notice was given him before he paid the purchase money; and if a payment is made by him after he has such notice, it is paid in his own wrong, and he must bear the loss.[1] It is a further rule that the burden of proving a valuable consideration is upon the purchaser when proof of that fact becomes necessary to his protection against either creditors or subsequent purchasers.[2]

The payment by the purchaser of a fair consideration upon the sale of property always affords strong evidence of the good faith of the transaction; and, while not conclusive upon that question, requires clear evidence of a fraudulent intent to overcome the presumption of honest motives arising from that fact.[3]

§ 11. What constitutes "value." What shall be deemed a valuable consideration within the rule which gives to an innocent purchaser the protection of a court of equity is not always an easy question for solution.[4] The authorities are, in the main, harmonious in declaring that it must consist of money or its equivalent,[5] the pecuniary character being the essential attribute. It may not consist of money, but it must represent money or be convertible into money. Conforming within this general principle, a wide latitude is given in the construction of the term "equivalent." Thus, where one acquired lands by exchange, this was held to be a purchase for value.[6] The payment of the consideration in negotiable notes, which have passed into the hands of a third person, has in sev-

[1] Blanchard v. Tyler, 12 Mich. 342; Roseman v. Miller, 84 Ill. 279; Kitteridge v. Chapman, 36 Iowa, 348.

[2] Williams v. Jones, 2 Ala. 314; Lane v. Starkey, 15 Neb. 285.

[3] Nugent v. Jacobs, 103 N. Y. 125.

[4] Bouvier defines valuable considerations as those which confer some benefit upon the party by whom the promise is made, or upon a third party at his instance and request; or some detriment sustained, at the instance of the party promising, by the party in whose favor the promise is made. 1 Bouv. Law Dict. 329. But see cases in following note.

[5] Kitteridge v. Chapman, 36 Iowa, 348; Haughwout v. Murphy, 21 N. J. Eq. 118; Savage v. Hazard, 11 Neb. 327. The term "valuable consideration," it is said, necessarily requires something of actual value, capable, in estimation of law, of pecuniary measurement. Brown v. Welch, 18 Ill. 343; Palmer v. Williams, 24 Mich. 328; Lawrence v. Clark, 36 N. Y. 128.

[6] Bowen v. Prout, 52 Ill. 354.

eral instances been considered a payment of value.[1] So, also, where the consideration was a debt due at the time by the vendor to the purchaser, such purchaser was held to have paid a valuable consideration,[2] provided there was an absolute extinguishment of the debt.[3] This seems to be in every way fair and just, and is a very generally accepted rule in case of chattel sales; but when applied to realty it seems to have been denied in several of the states, the courts holding that the purchaser must have advanced some new consideration, or relinquished some security for the pre-existing debt due to him, and that merely receiving a conveyance in payment of the same is not enough.[4]

[1] Kitteridge v. Chapman, 36 Iowa, 348; Digby v. Jones, 67 Mo. 104; Baldwin v. Sager, 70 Ill. 503.

[2] Cammack v. Soran, 30 Gratt. (Va.) 292; Busey v. Reese, 38 Md. 270; McMahan v. Morrison, 16 Ind. 172; Farlin v. Sook, 30 Kan. 401; Swift v. Tyson, 16 Pet. (U. S.) 19; Babcock v. Jordan, 25 Ind. 14.

[3] Saule v. Shotwell, 52 Miss. 236; Robinson v. Smith, 14 Cal. 94; Frey v. Clifford, 44 Cal. 335; Knox v. Hunt, 18 Mo. 174; Heath v. Silverthorn L. M. Co. 39 Wis. 146; Comegys v. Clarke, 44 Md. 111; and see Murphy v. Briggs, 89 N. Y. 446.

[4] Wood v. Chapin, 13 N. Y. 509; Cummings v. Boyd, 83 Pa. St. 372; and see Moore v. Ryder, 65 N. Y. 441, where the same principle is enunciated in connection with negotiable paper. The rule seems to be established in Massachusetts that a prior indebtedness is not a valuable consideration in such case. See Clark v. Flint, 22 Pick. 243. The principle upon which courts seem to proceed in the denial of the doctrine as stated in the text is that, where a conveyance is made or a security taken, the consideration of which is an antecedent debt, the grantee or person taking the security is not regarded as having parted with anything of value; that he loses nothing by the transaction, and therefore there is no reason why equity should interfere to protect him against a prior right, although he may have taken such conveyance or security without notice thereof. In the discussions, however, there is much refinement of reasoning to enable courts which announce this doctrine to maintain it. It has been most strongly asserted, and with the greatest show of reason, in case of mortgages; but the same reasons are assigned with respect to absolute conveyances. In regard to these latter, however, the strongest case is made where there has been no surrender of securities. Thus, Dr. Pomeroy, in support of the doctrine, says: "To hold that a conveyance as security for an antecedent debt is made without, but that one in satisfaction of such a debt is made with, a valuable consideration, when the fact of satisfaction is not evidenced by any act of the creditor, but depends on mere verbal testimony, is opening the door wide for the easy admission of fraud. It leaves the rights of third persons to depend on the coloring given to a past transaction by the verbal testimony of witnesses, after the event has disclosed to the form and nature in which it is for his interest to pict-

In the foregoing illustrations the principle of parting with value is fairly presented, and questions arising upon the same or similar facts now present but few difficulties; but it seems that the principle cannot be extended to cover the assumption of obligations, notwithstanding they are in one sense valuable considerations, and in proper cases will be upheld as such. Thus, an agreement for future support will not be considered value;[1] and where a conveyance is made on such agreement, and no consideration is actually paid, inasmuch as such conveyance has a tendency to defraud existing creditors, it will be void as against them.[2] Such deeds, however, are not fraudulent *per se*.[3]

With respect to services actually rendered under promise of payment there can exist no good reason why they should not be considered the equivalent of money, and that the debt thereby created should not be treated the same as any other pecuniary obligation. But where the parties stand in some close relation, conveyances made upon the consideration of such services have frequently been set aside as fraudulent, the attending circumstances repelling the presumption of good faith.[4]

§ 12. Purchaser with notice. With regard to a purchaser who has paid value, but who has yet received the conveyance with notice of the intent and design on the part of the vendor to defraud, hinder or delay his creditors, the adjudicated cases,

ure the transaction. A rule which renders it so easy for an interested party to defeat the rights of others is clearly impolitic." And see Mingus v. Condit, 23 N. J. Eq. 315; Hinds v. Pugh, 48 Miss. 276.

[1] Farlin v. Sook, 30 Kan. 401; Henry v. Heinman, 25 Minn. 199.

[2] Gunn v. Butler, 18 Pick. (Mass.) 248.

[3] Slater v. Dudley, 18 Pick. (Mass.) 373.

[4] A conveyance of real estate from a father to his daughter, in payment for services rendered during six years previous thereto, in his store and family, under an agreement that she should receive a salary of $500 per annum, was *held* to be fraudulent as to existing creditors on the ground of the grantor's embarrassments at the date of the conveyance, and the daughter's opportunity of knowledge of the state of his affairs, the great disparity between the value of her services and the price it was alleged she was to receive for them, and the further fact that the proof of the alleged contract rested entirely upon the testimony of the father and daughter, and that their statements and explanations were vague, unsatisfactory, and often conflicting. Haney v. Nugent, 13 Wis. 283.

while presenting some anomalies by contrast with certain well-defined principles of law, are mainly harmonious in declaring that the title thus derived may be impeached in his hands, and the sale condemned as fraudulent.[1] Nor is it necessary that the purchaser should have bought with the intention of aiding the vendor in his fraudulent design in order to enable the creditor of the vendor to have the conveyance set aside as fraudulent.[2] If the purchaser accepts the conveyance with notice of the fraudulent intent on the part of the grantor, the property so purchased may be subjected to the payment of the debts of the fraudulent vendor.[3]

Notice to the purchaser may be established by proving direct and positive knowledge on his part, or the notice may be inferred from the existence of certain facts and circumstances that would place a man of ordinary prudence on inquiry with reference to the conduct of the vendor.[4] With respect to this branch of the subject, however, the authorities are not in perfect harmony, nor is the matter of notice well defined. Thus, it has been held that mere knowledge by the vendee that his vendor is largely indebted will not avoid the sale as to him, though made with a fraudulent intent by the vendor;[5] and where it appears that he was entirely innocent and free from guilty knowledge or suspicion, mere negligence in not inquiring into facts known to him which were calculated to put him upon inquiry is not equivalent to a want of good faith, and does not charge him with notice of fraud.[6] On the other hand, there is a line of cases which seems to apply the doctrine of constructive notice with considerable strictness, holding that where knowledge is possessed of facts as above stated the matter of inquiry becomes a duty, and that a purchaser is guilty of bad faith if he neglects to prosecute such inquiries with ordinary diligence.[7]

[1] Bowyer v. Martin, 27 W. Va. 442; McKinnon v. Lumber Co. 63 Tex. 30.

[2] Hough v. Dickinson, 58 Mich. 89; Milner v. Davis, 65 Iowa, 265; McVeagh v. Baxter, 82 Mo. 518; and see Miller v. McNair, 65 Wis. 452.

[3] Cowling v. Estes, 15 Ill. App. 255; Bowyer v. Martin, 27 W. Va. 442.

[4] Cowling v. Estes, 15 Ill. App. 255; and see Milner v. Davis, 65 Iowa, 265.

[5] Baughman v. Penn, 33 Kan. 504.

[6] Parker v. Conner, 93 N. Y. 124; Stearns v. Gage, 79 N. Y. 102; Lyons v. Leahy, 15 Oreg. 8; Coolidge v. Heneky, 11 Oreg. 327.

[7] Hooser v. Hunt, 65 Wis. 78.

§ 13. Purchaser by quitclaim. The legal effect of a quitclaim deed is not the same in all of the states, from the fact that the courts of this country are hopelessly divided upon the question of the legal *bona fides* of a purchaser who takes by this species of conveyance. In the federal courts it is generally held that such a purchaser is not within the rule which gives protection from the operation of a prior conveyance or sale of which he had no notice, and that notice sufficient to repel the presumption of good faith is said to inhere in the very form of this kind of a conveyance.[1] So, too, it has been held in some of the state courts that a purchaser by quitclaim deed obtains just such title as the vendor had, and that the land in his hands remains subject to the equities attaching to it in the hands of the vendor, though they may be unknown to the purchaser.[2] It is contended in support of this doctrine that inasmuch as deeds with general warranty are usually given where there is no doubt about the title, and that it is only in case of doubt or uncertainty that a quitclaim deed is given or received, therefore, where a party takes by quitclaim, he knows that he is taking a doubtful title, and is put upon inquiry as to the same. It is further held that the very form of the deed indicates to the vendee that his grantor has doubts concerning the title, and that the deed itself is notice to the grantee that he is getting only a doubtful title.[3] Another argument has also been advanced, to the effect that, as a quitclaim can never of itself subject the maker thereof to any liability, such deeds may be executed recklessly, and by persons who have no real claim to the lands for which the deeds are given; and the deeds may be executed for a merely nominal consideration, and to enable speculators in doubtful titles to harass and annoy the real owners of the land.[4]

[1] May v. Le Claire, 11 Wall. (U. S.) 232; Oliver v. Platt, 3 How. (U. S.) 440; Dickerson v. Colgrove, 100 U. S. 578; Runyon v. Smith, 18 Fed. Rep. 579.

[2] Mann v. Best, 62 Mo. 491; Bayer v. Cockrill, 3 Kan. 283; Watson v. Phelps, 40 Iowa, 482; Bragg v. Paulk, 42 Me. 517; Rodgers v. Burchard, 34 Tex. 441; Derrick v. Brown, 66 Ala. 162; Everest v. Ferris, 16 Minn. 26; Kerr v. Freeman, 33 Miss. 292; Snowden v. Tyler, 21 Neb. 199.

[3] Johnson v. Williams, 37 Kan. 179.

[4] See Johnson v. Williams, 37 Kan. 179.

Where this doctrine prevails it is subject to but little exception, and the rule is usually applied without restriction or limitation that no one who takes under a quitclaim deed can be considered a *bona fide* purchaser. The idea underlying the proposition seems to be that, when his grantor is willing to give him only a quitclaim deed, he impliedly notifies him that there may be outstanding equities, and that he is willing to place him only in the same position which he himself holds; that the vendee is presumed to know what he is purchasing and takes his own risks.

On the other hand, numerous well-considered cases announce the doctrine that a quitclaim deed received in good faith and for a valuable consideration and which is recorded before a prior deed of bargain and sale, will prevail over such prior deed.[1]

§ 14. Purchaser from grantee by quitclaim. Conceding the rule that where a person purchases from another who is willing to give only a quitclaim deed, he may properly be regarded as charged with notice of defects and outstanding equities in his grantor's title, it does not seem that this principle can be extended to a subsequent purchaser who takes from such grantee by a deed with warranty. The subsequent purchaser, it may be presumed, pays what the parties deem the value of the property, and upon the assumption that he is acquiring a valid title. It has been held, therefore, that he cannot be affected by the mere fact that he takes through a quitclaim deed.[2]

The justness of such a ruling is apparent without demonstration, for it is not unreasonable to suppose that quitclaim deeds occur in the lives of many titles where there are no outstanding equities. If the rule were permitted to be extended it would tend directly to impair the selling value of all such property, and would operate to hinder improvements; and as it is the policy of the law that titles to real estate should become matters of certainty as far as possible, a person buying under such circumstances is presumptively a *bona fide* purchaser, and

[1] Graff v. Middleton, 43 Cal. 341; see Fox v. Hall, 74 Mo. 315; Pettingill v. Devin, 35 Iowa, 344. Marshall v. Roberts, 18 Minn. 405; Butterfield v. Smith, 11 Ill. 485; Bradbury v. Davis, 5 Colo. 265; and

[2] Winkler v. Miller, 54 Iowa, 476.

takes the title free from outstanding equities of which he had no notice.[1]

§ 15. A debtor may prefer one creditor. While the statute of frauds and perjuries declares null and void all contracts and deeds made with intent to hinder, delay or defraud creditors and others, yet the law seems to be firmly established that a debtor in failing circumstances has an undoubted right to prefer one creditor to another, and to pay him fully, even if by so doing he exhausts his whole property, leaving nothing for others equally meritorious.[2] Upon the same principle he may also partially pay a portion of his creditors and neglect others, and the law will not disturb such disposition of his property when the settlement is fairly made, without onerous conditions to the creditors or provisions for his own advancement.

Local statutes may have the effect to vary or repeal this rule; but in the absence of a general bankrupt law or local laws abridging the right, the doctrine seems too firmly settled by the authorities to be questioned.

But to have force and validity it is absolutely necessary that the conveyance be entirely free from fraud in its inception and purposes, for a court of equity will never permit the misappropriation of a trust fund, but will hold parties to fair and honest dealings with it. And so, while a debtor in failing circumstances may prefer one creditor to another, he cannot cover a much larger amount of property than will satisfy the debt.[3]

[1] Winkler v. Miller, 54 Iowa, 476; Snowden v. Tyler, 21 Neb. 199.

[2] Clark v. White, 12 Pet. (U. S.) 178; Grover v. Wakeman, 11 Wend. (N. Y.) 194; Powers v. Green, 14 Ill. 386; Tomlinson v. Matthews, 98 Ill. 178; Widgery v. Haskell, 5 Mass. 144; Thomas v. Goodwin, 12 Mass. 140.

[3] Mitchell v. Beal, 8 Yerg. (Tenn.) 134. A creditor who takes a conveyance from his debtor to secure his debt, but at the same time inserts provisions in the deed to delay, hinder or defraud other creditors, comes within the statute of frauds, and the conveyance is void; so likewise if the grantee be privy to a fraudulent intent on the part of the grantor, and takes a deed to secure his own debt, with provisions to delay, hinder or defraud other creditors, the deed will be void, although his only motive was to secure his own debt, and the other provisions were forced upon him by the grantor as the only means of having his own debt secured. Such a grantee will not be considered as a *bona fide* purchaser. Garland v. Rives, 4 Rand. (Va.) 282.

Nor is there any manifest impropriety in thus preferring one creditor to another, for a person, though insolvent and financially embarrassed, may nevertheless sell his property to pay his debts; and where no lien exists to prevent it may sell to whomsoever he pleases.[1] Although a person may be credited upon the faith of his ownership of property, this will give the creditors no specific lien upon it, or prevent his subsequently selling and conveying the same to a purchaser in good faith paying a valuable consideration therefor; and a creditor may purchase whose debt may thereby be paid, although other creditors are left unpaid.[2]

§ 16. When declarations of vendor are evidence against the vendee. To set aside a conveyance on the ground of fraud it is not only necessary that there should have existed a fraudulent intent on the part of the vendor, but also, in most cases, that this shall have been participated in by the vendee, resulting in injury to the party complaining. The acts and declarations of the vendor are of course competent to show such fraud in him, but not in themselves sufficient to show that the vendee acted from the same motive. Were this otherwise, then every purchaser would hold at the mercy of him from whom he bought. Yet where acts or declarations of the vendor in relation to the estate conveyed, and tending to show a fraudulent intention on his part, are made by him before he parts with his interest, and in the presence of or with knowledge on the part of the vendee, they become proper evidence upon an inquiry into the validity of the conveyance, and may be given to show fraud on the part of the purchaser as well.[3] It is said that the principle upon which such evidence is received is that the declarant was so situated that he probably knew the truth, and his interests were such that he would not have made the admissions to the prejudice of his title or possession unless they were true.[4]

[1] Wood v. Shaw, 29 Ill. 444; Miller v. Kirby, 74 Ill. 242.

[2] Tomlinson v. Matthews, 98 Ill. 178.

[3] Ruffing v. Tilton, 12 Ind. 260; Hughes v. Monty, 24 Iowa, 499; Wadsworth v. Williams, 100 Mass. 126; Chadwick v. Fonner, 69 N. Y. 404; Alexander v. Caldwell, 55 Ala. 517; Rush v. French, 1 Ariz. 99; McFadden v. Ellmaker, 52 Cal. 348.

[4] Chadwick v. Fonner, 69 N. Y. 404. In this case the plaintiff had previously purchased by parol twelve

The acts and declarations of the vendor, made after the conveyance and inconsistent with it, but while in possession of the premises or exercising control over them, are also held to be admissible in evidence to show the true character and purpose of the conveyance.[1] This, at first blush, would seem to be in conflict with the old and oft-cited rule "that declarations made by the person under whom the party claims, after the declarant has departed with his right, are inadmissible to affect any one claiming under him;"[2] but it seems this rule does not apply where the declarant has not parted with the possession as well as the title. When the question of whether a conveyance is fraudulent or not arises between the vendee and the creditors of the vendor thereon, a creditor may always show that, notwithstanding the conveyance, the vendor continued in possession and control. To this end acts of the vendor implying ownership and control may be shown; and, also, as a part of the *res gestæ*, the declarations accompanying such acts or possession may be proven to show the nature, extent and purposes thereof.[3] "It may be remarked," observes Deady, J., "as bearing on this question, and the consideration to be given to the learning of the earlier authorities, that with the growth of the idea that it is better to enlarge the field of evidence than to restrict it, the admissibility of this kind of declaration is received with increasing favor; and it is safe to affirm that there is no reason why an act tending to show ownership on the

acres of land, for which he had paid the contract price. Afterwards his vendor resold the land to the defendant and made conveyance. It does not appear that any admissions of such former sale were made to or in the presence of defendant, but plaintiff prior to the making of the deed to defendant had gone into possession and was in possession at that time. The evidence consisted of admissions of his grantor (who, it seems, died shortly after the last transaction) to the effect that he had sold the land to plaintiff and received pay therefor. *Held*, that the evidence was competent against the second vendee.

[1] Richardson v. Mounce, 19 S. C. 477; United States v. Griswold, 7 Sawyer (C. Ct.), 311; Harrington v. Chambers, 3 Utah, 94.

[2] 2 Phil. Ev. n. 481, p. 655; and see McSweeney v. McMillen, 96 Ind. 298; Bixby v. Carskaddon, 63 Iowa, 164; Headen v. Womack, 88 N. C. 468; McLaughlin v. McLaughlin, 91 Pa. St. 83.

[3] Trotter v. Watson, 6 Humph. (Tenn.) 509; Baucum v. George, 65 Ala. 259; Cahoon v. Marshall, 25 Cal. 202; Potter v. McDowell, 31 Mo. 74; Williams v. Hart, 65 Ga. 201; and see 1 Greenl. Ev. § 109.

part of the vendor after sale should be received as an item of evidence to prove the true character of the alleged fraudulent transaction, which does not equally support the admission of the declaration which accompanies it, and is to all intents and purposes a part of it."[1] The rule cannot be considered as settled, however; and though the tendency is to permit the admission of the statements of the vendor, made after he has parted with title, whenever a conspiracy to defraud the vendor's creditors has been shown to exist,[2] yet there are not wanting numerous authorities holding an exactly contrary view,[3] and which utterly preclude all such statements, even though made while the vendor remains in possession.[4]

Where a purchase has been made for a valuable consideration, and there is no proof establishing a conspiracy between the purchaser and the vendor to defraud or hinder others, an action brought to deprive him of the property which he has bought can only prevail by proof that he had actual notice of a fraudulent motive on the part of the vendor or knowledge of circumstances which was equivalent to such notice. If he knew or had reason to believe the motives of his vendor to be fraudulent, then by aiding him in his scheme he would make himself a party to the fraud;[5] but no evidence, it seems, is competent to affect him or his right to the possession of his property which falls short of proving the nature of the transaction and of showing a guilty participation on his part. In case of conspiracy, admitted or proved, the admissions or declarations of either would be competent as against the other; but unless such is the case, acts or declarations of the vendor, unless a part of the *res gestæ*, are inadmissible.

In order that the declarations of a party which are claimed to be part of the transaction may be admissible they must grow out of the principal fact or transaction, illustrate its character, be contemporaneous with it, and derive some degree of credit from it.[6] Hence, it has been held that proof of the declarations of the vendor made before transfer and before

[1] United States v. Griswold, 7 Sawyer (C. Ct.), 311.

[2] Kennedy v. Divine, 77 Ind. 490; Daniels v. McGinnis, 97 Ind. 549.

[3] Tabor v. Van Tassell, 86 N. Y. 642.

[4] McCormicks v. Fuller, 56 Iowa, 43.

[5] Parker v. Conner, 93 N. Y. 118.

[6] Lund v. Tyngsborough, 9 Cush. (Mass.) 36.

negotiations for the same is not competent against the vendee: that they in no sense form a part of the subsequent transaction between them, and that to admit them for the purpose of charging the vendee with liability to restore the property would be a clear violation of the principles of evidence and without support in authority.[1]

§ 17. Exempt property — Conveyance of the homestead. It is axiomatic that there cannot be as against creditors a fraudulent conveyance of that which they could not reach; and where, as is the case in many of the states, a specific area is exempted from seizure and sale, without reference to the quality of the estate or value of the land where the same is held as a homestead, a conveyance of the same cannot under any circumstances be considered fraudulent.[2] And, generally, if one having less property than he is entitled to retain under the exemption laws buys land and voluntarily conveys it, his creditors cannot complain,[3] as they are in no way injured thereby.[4]

§ 18. Heirs of fraudulent grantee. As has been shown, the fraud of the ancestor avoids the title cast by descent upon his heirs, who occupy no better position in law than was held by him. But the fraud of the ancestor should not, and as a rule does not, deprive them of the benefit of expenditures which they have in good faith and in ignorance of the ancestral fraud made upon the premises; especially where the laches of the creditor has left them for considerable time in possession of the premises, thereby inducing a belief that their title was indisputable. In such a case it would seem that improvements which they have made innocently, and while in possession of the property, should be the subject of compensation on subsequent eviction, and a decree finding the original transfer fraudulent and void should also direct an investigation to ascertain the amount of the expenditures for which the heirs are equitably entitled to be compensated.[5]

§ 19. Voluntary conveyances. A voluntary conveyance, or one made without consideration, while vesting title in the

[1] Bush v. Roberts, 111 N. Y. 278; and see Truax v. Slater, 86 N. Y. 632.

[2] Stanley v. Snyder, 43 Ark. 429; Smith v. Rumsey, 33 Mich. 183; Carhart v. Harshaw, 45 Wis. 340; Delashmut v. Trau, 44 Iowa, 613; Legro v. Lord, 10 Me. 161.

[3] Faurote v. Carr, 108 Ind. 123.

[4] Tracy v. Cover, 28 Ohio St. 61.

[5] Bomberger v. Turner, 13 Ohio St. 263.

grantee according to its terms, is universally held to be voidable when its only object is to hinder, delay or defraud creditors. Not but that the owner of land has the right to dispose of it in any manner his fancy may dictate, and, if he sees fit, to bestow it upon his grantee as a gift, yet, being held to the observance of good faith with those whom he may have business dealings, the law will not permit him to incapacitate himself from the redemption of his pledges or the performance of his obligations with a fraudulent intent. Hence, a voluntary conveyance made in anticipation of becoming indebted, and for the purpose of hindering or delaying creditors, is fraudulent, and may be impeached by any creditor, although the grantor was solvent at the date of the conveyance;[1] while a purchaser who does not pay a valuable consideration for land cannot hold it as against his vendor's creditors, even though he had no knowledge of the fraudulent intention of his vendor.[2]

Nor will one who takes land as a volunteer, although without notice of the equities of others, be protected against third parties claiming equitable rights. He must prove that he paid the purchase money, and this independently of the recitals in his deed.[3]

The authorities upon the subject of voluntary conveyances are not uniform, however; and there are two clearly-defined lines of decision, one of which states a rule, with no exceptions, the other practically stating the same rule, but with an important exception. The former class of decisions holds that if a party be indebted at the time of the voluntary conveyance, it is presumed to be fraudulent in respect of such debts, and no circumstances will permit them to be affected by the conveyance or repel the legal presumption of fraud; that this presumption of law does not depend upon the amount of the debts or the extent of the property conveyed or the circumstances of the grantor.[4] So far as the conveyance is made to

[1] Morrill v. Kilner, 113 Ill. 318. The word "indebtedness," when speaking of conveyances in fraud of creditors, is not construed to mean a fixed sum due, but any liability that may have been incurred by contract, either express or implied, that renders the party a debtor within the meaning of the law. Mattingly v. Wulke, 2 Ill. App. 169.

[2] Brown v. Hedge Co. 64 Tex. 369; Roseman v. Miller, 84 Ill. 297.

[3] Roseman v. Miller, 84 Ill. 297.

[4] See Reade v. Livingstone, 3 Johns. Ch. (N. Y.) 481, which is the leading American case on this subject. But

strangers this is still the recognized rule, except where the same has been changed by statute; but the latter class of cases above referred to has introduced an important exception to the rule where the conveyance is made to relatives. Under these decisions a broad distinction is made between the relatives of the grantor and strangers; and where no actual fraudulent design is shown, a voluntary conveyance made to wife or children is not for that reason invalid, and if reasonable and in proper proportion to his property it will be permitted to stand.[1] The subject will be further discussed in the succeeding paragraphs.

It must be observed, however, that the doctrine of the invalidity of voluntary conveyances does not rest upon the ground simply that they are voluntary or given without adequate consideration, but they are deemed void because they are fraudulent; and such conveyances, if made when the grantor is not indebted, nor with a view of becoming so, and in good faith, without any intent to defraud, are valid as against subsequent purchasers and creditors with notice.[2]

§ 20. Operation and effect — As between the parties. It is a rule of uniform and general observation that, as between the parties and those in privity with them, a voluntary conveyance is valid and binding, and is not distinguishable in legal effect from one made upon full and adequate consideration.[3]

this doctrine was afterwards condemned in New York, and by a later statute the question of fraud is made one of fact. The same rule has been announced in the following cases: Foote v. Cobb, 18 Ala. 585; Spencer v. Goodwin, 30 Ala. 355; Cook v. Johnson, 12 N. J. Eq. 51; Kuhl v. Martin, 26 N. J. Eq. 60; Fellows v. Smith, 40 Mich. 689; and see Moore v. Orman, 56 Iowa, 39; Boulton v. Hahn, 58 Iowa, 518.

[1] The leading case in support of this view is Salmon v. Bennet, 1 Conn. 525, decided in 1816. It has been substantially followed in a majority of the states. See Weed v. Davis, 25 Ga. 684; Sweeney v. Damron, 47 Ill. 450; Filby v. Register, 14 Minn. 391; Patten v. Casey, 57 Mo. 118; Ammon's Appeal, 63 Pa. St. 284; Yost v. Hudiburg, 66 Tenn. 627; French v. Holmes, 67 Me. 186; Morrison v. Clark, 55 Tex. 437; Dood v. McCraw, 8 Ark. 83; Worthington v. Bullitt, 6 Md. 172; Smith v. Lowell, 6 N. H. 67; Grotenkemper v. Harris, 25 Ohio St. 510.

[2] Gardner v. Boothe, 31 Ala. 186; Aiken v. Buren, 21 Ind. 137; Brown v. Burke, 22 Ga. 574; Coppage v. Barnett, 34 Miss. 621; Mayor v. Williams, 6 Md. 235.

[3] Chapin v. Pease, 10 Conn. 69; Jacobs v. Smith, 89 Mo. 673; Eyrick v. Hetrick, 13 Pa. St. 491; McGuire v. Miller, 15 Ala. 394; Bullitt v. Taylor, 34 Miss. 708; Mercer v. Mercer, 29 Iowa, 557; Fouby v. Fouby, 34 Ind. 433; Wallace v. Harris, 32 Mich.

That the deed was fraudulent in its inception, and executed only for the purpose of hindering and delaying creditors, will not change the rule; for the grantor, by a stern but proper policy of the law, is excluded from the proof which would show the fraud,[1] and though the conveyance may be void as to creditors, yet the title thus vested will be absolute as between the parties.[2] The reason of the rule is obvious; for, if it were allowed to the grantor to plead the mutual fraud of the parties in order to enable him to avoid the consequences of his deed, he would virtually reap the reward of his own iniquity when he was the real actor in the fraud, and the effect would be to encourage others in violating the law, with a hope to profit by defrauding their creditors, and with no chance to lose, even if their grantees should attempt to take advantage of their position and thereby to promote instead of discourage contracts of a like character.[3]

But this rule operates only in cases where the refusal of the courts to aid either party frustrates the object of the transaction, and takes away the temptation to engage in contracts *contra bonos mores*, or in violation of the policy of the law. If it be necessary, in order to discountenance such transactions, to enforce such a contract at law, or relieve against it in equity, it will be done though both parties are *in pari delicto*.

The effect of a fraudulent deed is to bind not only the grantor, but his heirs, privies and assigns — all, in fact, who claim by, through or under him.[4]

§ 21. Continued — As between the parties and third persons. But while the operation and effect of voluntary con-

380; Laberee v. Carleton, 53 Me. 211; Harmon v. Harmon, 63 Ill. 512; Peterson v. Brown, 17 Nev. 172. No consideration was required in conveyances under the common law, the homage and fealty incident to the same being deemed sufficient.

[1] Peterson v. Brown, 17 Nev. 172; Chapin v. Pease, 10 Conn. 69.

[2] Murphy v. Hubert, 16 Pa. St. 57; Wiley v. Bradley, 67 Ind. 560; Zimmerman v. Fitch, 28 La. Ann. 454; Parkhurst v. McGraw, 24 Miss. 134; Waterbury v. Westervelt, 9 N. Y. 598; McMaster v. Campbell, 41 Mich. 513; Hoeser v. Kraeka, 29 Tex. 450.

[3] Peterson v. Brown, 17 Neb. 172; Smith v. Hubbs, 10 Me. 71; Payne v. Burton, 10 Ark. 53; Davis v. Mitchell, 34 Cal. 81; O'Niel v. Chandler, 42 Ind. 471.

[4] Finley v. McConnell, 60 Ill. 259; Bush v. Rogan, 65 Ga. 320; Battle v. Street, 85 Tenn. 282; Smith v. Grim, 28 Pa. St. 95; Anderson v. Brown, 72 Ga. 713; Jacobs v. Smith, 89 Mo. 673.

veyances as between the parties now admits of but little controversy, yet with respect to persons other than the parties, notably creditors and subsequent purchasers, the law is not so well settled. It was formerly held, and indeed in a few states still seems to be maintained, that a voluntary conveyance, made at a time when the grantor is indebted, is presumed to be fraudulent as a conclusion of law, no matter how innocent or meritorious the motive with which the conveyance was made, and without regard to the amount of the debts or the extent of the property so conveyed.[1] But this doctrine, confessedly harsh and in its application oft-times positively unjust, obtains but a limited recognition, and in many instances where it has been announced has been qualified in such a manner or so liberally construed as to practically render nugatory its more repulsive features.[2] The better rule, and that which prevails in a majority of the states, provides that a voluntary conveyance is not, for that reason alone, fraudulent.[3] It is the undoubted right of every property owner to dispose of the same at any price he may see fit, or, in his discretion, to confer it on whom he may choose as a free gift; and if at the time of the conveyance he has sufficient assets to pay all existing claims, and the circumstances attending the transfer repel any possible imputation of fraud, the deed will be effectual to vest title not only as against the grantor, but against his creditors as well.[4]

Where, however, a voluntary conveyance is made by one largely indebted in comparison to his resources, the transaction in itself raises a presumption of constructive fraud, no matter what the motive which induced it;[5] and if such con-

[1] Spencer v. Goodwin, 30 Ala. 355; Lockhard v. Beckley, 10 W. Va. 101; Hanson v. Buckner, 4 Dana (Ky.). 251; Richardson v. Rhodus, 14 Rich. (S. C.) 96.

[2] See Dulme v. Young, 3 Bush (Ky.), 350; Emerson v. Beemis, 69 Ill. 540; Annin v. Annin, 24 N. J. Eq. 184.

[3] Pence v. Croan, 51 Ind. 336; Holden v. Burnham, 63 N. Y. 74; Hoxie v. Price, 31 Wis. 82; Gwyer v. Figgins, 37 Iowa, 517; Grant v. Ward, 61 Me. 239; Wilson v. Cohlheim, 46 Miss. 346; Greenfield's Estate, 14 Pa. St. 489; Dewey v. Long, 25 Vt. 564; Warner v. Dove, 33 Md. 579; Hester v. Wilkinson, 6 Humph. (Tenn.) 215; Smith v. Vodges, 92 U. S. 183; Lerow v. Wilmarth, 9 Allen (Mass.), 386.

[4] Wiley v. Bradley, 67 Ind. 560; Zimmerman v. Fitch, 28 La. Ann. 454; Potter v. McDowell, 31 Mo. 62; Salmon v. Bennett, 1 Conn. 525; Graves v. Atwood, 52 Conn. 512.

[5] Kehr v. Smith, 20 Wall. (U. S.)

veyance leaves him unable to pay his debts, or if within a short time such conveyance is followed by a fraudulent disposition of his remaining estate, the deed will be void, both as to existing and subsequent creditors.[1]

§ 22. Conveyances from husband to wife. The right of a husband to settle a portion of his property upon his wife and thus provide against the vicissitudes of fortune, when this can be done without impairing existing claims of creditors, is indisputable.[2] It arises as a natural consequence of that absolute power which a man possesses over his own property by which he can make any disposition of it he may see fit, providing in so doing he does not conflict with the existing rights of others; and its exercise is upheld by the courts as tending not only to the future comfort and support of the wife, but also, through her, to the support and education of any children of the marriage.[3] The only question that can properly be asked in any case where a husband makes a voluntary settlement of any portion of his property for the benefit of others who stand in such a relation to him as to create an obligation, legal or moral, to provide for them is: Does such a disposition of the property deprive others of any existing claim to it? If it does not, no one can complain if the transfer be made a matter of public record and be not designed as a scheme to defraud future creditors.[4] Neither can it make any difference through what channels the property passes to the party to be benefited, whether by direct conveyance from the husband or through the intervention of others. It is true that neither

31; Vertner v. Humphreys, 22 Miss. 130; Crumbaugh v. Kugler, 2 Ohio St. 373.

[1] Kehr v. Smith, 20 Wall. (U. S.) 31; Robinson v. Stewart, 10 N. Y. 189; Sexton v. Wheaton, 8 Wheat. (U. S.) 229.

[2] Jones v. Clifton, 101 U. S. 225; Reade v. Livingston, 3 Johns. Ch. (N. Y.) 501; Bennett v. Bedford Bank, 11 Mass. 421; Gridley v. Watson, 53 Ill. 186; Brown v. Spivey, 53 Ga. 155; Chambers v. Sallie, 29 Ark. 407; Loyd v. Bunce, 41 Iowa, 660; Vance v. Smith, 2 Heisk. (Tenn.) 351; Taylor v. Eastman, 92 N. C. 601.

[3] Sexton v. Wheaton, 8 Wheat. (U. S.) 229; Jones v. Clifton, 101 U. S. 225; Gridley v. Watson, 53 Ill. 186.

[4] Johnson v. West, 43 Ala. 689; Meyers v. Sheriff, 21 La. Ann. 172; Pike v. Miles, 23 Wis. 164; Gridley v. Watson, 53 Ill. 186; Vance v. Smith, 2 Heisk. (Tenn.) 351; Jones v. Clifton, 101 U. S. 225; Thompson v. Allen, 103 Pa. St. 44; Sayers v. Wall, 26 Gratt. (Va.) 354; Walsh v. Ketchum, 84 Mo. 427.

under the common law nor by the English statutes[1] could a husband convey his property directly to his wife;[2] but the codes of most of the states now permit this, while the technical reasons of the common law arising from the unity of husband and wife, which would prevent a direct conveyance from one to the other for a valuable consideration, have long since ceased to operate in the case of a voluntary transfer or settlement.[3]

The mere fact that the husband is indebted to sundry creditors in small amounts, he being at the time in good circumstances and the gift reasonable, will not render the conveyance invalid,[4] unless it can be shown that the transfer was made with a fraudulent intent with a view to future debts,[5] while if he was free from debt a deed made in good faith will be sustained, even though it was all the land he owned, and a large portion of all his property.[6] If the husband is embarrassed in financial matters, or fails to retain sufficient property to meet accruing liabilities, or if the provision made for the wife is excessive in view of existing circumstances, or if other facts appear which negative the idea of good faith and sincerity of purpose, the conveyance will stand upon the same ground as other voluntary transfers, and may be impeached on proper showing.[7]

Where a husband and wife acquire property by their joint industry, the title being in the husband's name, a conveyance thereof to the wife without consideration or upon no other

[1] Under the English statute he was permitted to convey his property to a trustee for the use and benefit of the wife, but the property in the hands of the trustee was still liable for his debts.

[2] Conveyances of this character, when meritorious, have always been sustained in equity.

[3] Jones v. Clifton, 101 U. S. 225.

[4] Hind's Lessee v. Longworth, 11 Wheat. (U. S.) 199; Salmon v. Bennett, 1 Conn. 525; Picquet v. Swan, 4 Mass. 443; Emerson v. Bemis, 69 Ill. 537; Chambers v. Sallie, 29 Ark. 407; Brown v. Spivey, 53 Ga. 155; Sayers v. Wall, 26 Gratt. (Va.) 354; Wheeler, etc. Co. v. Monahan, 63 Wis. 198.

[5] Reade v. Livingston, 3 Johns. Ch. (N. Y.) 501; Bennett v. Bedford Bank, 11 Mass. 421; Smith v. Vodges, 92 U. S. 183.

[6] Thompson v. Allen, 103 Pa. St. 44; Wheeler, etc. Co. v. Monahan, 63 Wis. 198; Wood v. Broadley, 76 Mo. 23; Majors v. Everton, 98 Ill. 56; Horder v. Horder, 23 Kan. 167.

[7] Crawford v. Logan, 97 Iowa, 396; Annin v. Annin, 24 N. J. Eq. 184; Warlick v. White, 86 N. C. 139.

consideration, if to the prejudice of existing creditors of the husband, will be void.[1]

§ 23. **Continued — Purchaser from wife.** But notwithstanding that the wife may acquire property directly from the husband during coverture, provided it be not in fraud of the rights of creditors, yet the relations between them are such that courts are ever watchful in dealing with voluntary conveyances to see that they are not mere contrivances to put the property of the husband beyond the reach of his creditors. In justice to such creditors it is contended that such conveyances should, in themselves, be sufficient to put a purchaser from the wife upon inquiry. "To hold otherwise," says Robinson, J.,[2] "to say that the wife may, in the next moment, sell the property, and the purchaser is under no obligation to know or even to make inquiry whether the conveyance to her be in fraud of creditors, would be to put it in the power of a bankrupt and dishonest husband to cheat and defraud his creditors at will." Hence it has been held that a purchaser of property thus acquired by the wife is bound to know that the same was liable to the husband's debts if there was no other sufficient property with which they could be paid, and with this knowledge he is put upon inquiry as to the existence and extent of the debts for which the property might be liable; and that if he fails or refuses to make the inquiry he is chargeable with the knowledge of such facts as the inquiry would necessarily have disclosed.[3] Probably this is an extreme view, for circumstances have much to do in regulating the application of so stringent a rule. If a long interval has elapsed between the conveyance to the wife and her subsequent conveyance, it manifestly should not and probably would not apply.

§ 24. **Conveyance to wife upon consideration.** Notwithstanding that transactions between husband and wife will be closely scrutinized where their effect is to deprive creditors of their rights against his property, yet where sales and conveyances are made in good faith and upon adequate consideration they are not distinguishable in legal effect from sales made to

[1] Langford v. Thurlby, 15 Rep. 436.
[2] Milholland v. Tiffany, 2 Atl. Rep. 831.
[3] Green v. Early, 39 Md. 225; Hooser v. Hunt, 65 Wis. 71.

a stranger. There is no impropriety in such a transaction, and deeds so made will be valid and binding as against all persons in the absence of fraudulent intent.[1] Where the moving consideration in the purchase of land by the husband is money procured from the separate estate of the wife, he may properly indemnify her by a conveyance of the same property;[2] while the discharge of an indebtedness to the wife, contracted either before[3] or after marriage,[4] would form a good consideration to support a deed to her of his lands.[5] So, also, if a man in failing circumstances owes his wife, he may prefer her as he may any other creditor;[6] nor does it make any difference that the statute of limitations has run against the debt.[7]

Where the wife is a creditor of her husband for money loaned, she is regarded as being as much entitled to payment as if she had been a *feme sole*. The husband in such case has a clear and undoubted right to pay the debt any time, in money or in property, and to prefer his wife over other creditors in so doing; and where land is so conveyed to her she will hold it free from the claim of any other of his creditors.[8]

[1] Addicken v. Humphal, 56 Iowa, 366; Thompson v. Feagin, 60 Ga. 82; Beddell's Appeal, 87 Pa. St. 510; Chapman v. Summerfield, 36 Kan. 610.

[2] Barclay v. Plant, 50 Ala. 509; Thompson v. Mills, 39 Ind. 528; Taylor v. Duesterberg, 109 Ind. 165; Childs v. Conner, 48 How. Pr. (N. Y.) 513.

[3] Barclay v. Plant, 50 Ala. 509.

[4] Hogan v. Robinson, 94 Ind. 138.

[5] And it would seem that, even under a statute prohibiting the making of contracts between husband and wife for the sale of any property, the husband cannot be prevented from executing, and the wife from accepting, a conveyance in restitution of moneys belonging to her which he had received and appropriated to his own use. Goodlett v. Hansell, 66 Ala. 151.

[6] McManus v. Mills, 19 Ill. App. 398. Where a married woman actually loaned her husband money which she derived from her father and his estate, taking the husband's notes for its repayment, and she did not know at the time of making the loans that he was in failing circumstances, and he afterwards conveyed a tract of land to her, not worth more at the time than the amount due from him to her, such conveyance was held valid as against the creditors of the husband whose debts were contracted prior to the conveyance. Tomlinson v. Matthews, 98 Ill. 178.

[7] Kennedy v. Powell, 34 Kan. 22; Rudershusen v. Atwood, 19 Ill. App. 58; Conner v. Allen, 72 Ga. 1.

[8] Cornell v. Gibson, 114 Ind. 144; Kyger v. Hull Skirt Co. 34 Ind. 249; Hill v. Bowman, 35 Mich. 191; Sims v. Moore, 74 Iowa, 497; Farmers' Bank v. Warner, 68 Iowa, 147; Bean v. Patterson, 122 U. S. 496; Bates v. McConnell, 31 Fed. Rep. 588.

But although a husband in failing circumstances may pay a debt due from him to his wife by the conveyance of property, and such conveyance will prevail against other claims, yet the presumption of good faith may be overcome by circumstances supplying ground for a legitimate inference that the conveyance is a voluntary one and fraudulent as to creditors, although there be no actual fraud. In cases of this kind good faith is presumed, and unless this presumption is overthrown the conveyance cannot be impeached; yet it is not necessary in any case that the evidence should be direct and positive — it is sufficient if it supplies grounds for a legitimate inference.

As a rule, conveyances from husband to wife or from one relative to another are viewed with suspicion when their tendency is to interfere with the rights of the grantor's creditors. The proof requisite to support them should be clear and convincing, because the temptation for a distressed debtor to shelter his property from the pursuit of creditors by placing it in the name of one of his near relatives is very great; and unless such a conveyance distinctly appears to have been entirely free from wrong intent, or the presumption of fraud be overcome by satisfactory affirmative proof, it will not be sustained.[1] In such event the element of good faith is very important, and it should clearly appear that the wife has a valid and subsisting debt, which is to be enforced and payment exacted regardless of the husband's fortune or misfortune.[2]

A frequent example of conveyances of the character under consideration is afforded in cases where the wife at some remote period has given or intrusted money to her husband to be used by him at his pleasure. The general opinion seems to be that where such advancements are voluntary on the part

[1] Burt v. Timmons, 29 W. Va. 441; Little v. Birdwell, 21 Tex. 597; Robinson v. Frankel, 85 Tenn. 475; Enneking v. Scholtz, 69 Iowa, 473.

[2] Frank v. King, 121 Ill. 250. In this case a person exchanged a tract of land belonging to his wife, of the value of $1,000, for other land, taking the title to the latter in his own name by her consent, and giving no obligation to pay her anything, and he afterward sold the land thus acquired for $1,600, and used the money, and $200 more of his own, in the purchase of another tract, and some twelve years after exchanging his wife's land, and while largely indebted and insolvent, conveyed the tract last acquired to his wife. *Held*, that the conveyance to the wife could not be held good as against the husband's creditors.

of the wife and with no contract or express promise for repayment on the part of the husband, they do not constitute a valid consideration, as against existing creditors, for a conveyance from husband to wife.[1] As a rule such advances are regarded as a gift; and where a husband has for many years collected his wife's revenue, without objection on her part, and has used and expended the same in his own business, obtaining credit on the faith of its being his own, the wife cannot afterwards assert her claim to it or its proceeds against his creditors.[2]

In all cases, therefore, to secure to the wife the benefit of her purchase, it would seem that she must place herself upon the same plane as any other purchaser for value; and whether the moving consideration is presently paid or consists of an antecedent debt, it must be pecuniary in character and capable of measurement in contemplation of law. Merit alone is not sufficient when the rights of others are invaded.

It has been held that the verbal promise of a wife to release her right of dower in certain property of the husband (though subsequently executed) is not a valuable consideration for a conveyance of other property by him to her through a third person.[3] But as a general rule a wife's release of dower in her husband's lands, or the renunciation of her inheritance in her own, or a cession by her of any other rights of property, is a sufficient consideration for a reasonable settlement upon her by the husband out of his own property.

§ 25. Conveyance to wife — Consideration paid by husband. Among the most common of the examples now under consideration is that of a conveyance to the wife procured by the husband upon a consideration moving from himself. Where such conveyance is procured to be made in good faith, and intended as an absolute gift or post-nuptial settlement, it will, as a rule, be upheld as against subsequent creditors of the husband,[4] and in some instances even as against those whose demands accrued before such conveyance, where the same was

[1] Hanson v. Manley, 72 Iowa, 48.
[2] McLure v. Lancaster, 24 S. C. 273; Humes v. Scruggs, 94 U. S. 22; Driggs Bank v. Norwood, 50 Ark. 42; Jenkins v. Middleton, 68 Md. 540.
[3] Collinson v. Jackson, 8 Sawyer (C. Ct.), 357; Harrison v. Carroll, 11 Leigh (Va.), 476.
[4] Gassett v. Grout, 4 Met. (Mass.) 486.

procured and made without fraudulent intent. But where it appears that the conveyance to the wife is a mere device or contrivance to put the husband's property in the wife's name, beyond the reach of creditors or the contingencies of business, while he remains in the possession, control and enjoyment of the same as though the legal title was in himself, a court of equity will disregard such device and hold her as the trustee of her husband, and subject the property to the payment of his debts at the suit of his creditors.[1]

Purchases of real property made during coverture by the wife of an insolvent debtor are justly regarded with suspicion. The presumption is strong that the consideration therefor moved from the husband, and she will not be permitted to prevail in contests with his creditors unless this presumption be overcome by affirmative proof; and the burden is upon her to prove distinctly that she paid for it out of her separate estate or with funds not furnished by her husband.[2]

Conveyances to children stand upon the same footing; and where a father having purchased land and paid the price thereof causes the same to be conveyed to one of his minor children, such child will ordinarily be treated as an involuntary trustee for its father and his creditors.[3]

§ 26. **Continued — Purchaser from wife.** While the law is rigorous in the exaction of direct, positive and affirmative proof in contests between the wife and the creditors of her husband, imposing upon her the burden of proof and raising presumptions against her at the outset, the same rules do not apply where such contest is between the creditors and one claiming the property as a *bona fide* purchaser from her. It is true that, in a case where the purchase was originally made by the husband and the property was then conveyed to the wife, inasmuch as the deeds would disclose the method of the acquisition of title, the purchaser would take with notice of

[1] United States v. Griswold, 8 Fed. Rep. 556. If in the purchase of land the consideration money be advanced by the husband and a deed taken in the name of the wife, the transaction will in the first instance be deemed an advancement to the wife; but it is open to explanation, and if it be shown that the object of the husband was to defraud creditors, he will be deemed to have a resulting interest in the premises, which may be sold by execution. Guthrie v. Gardner, 19 Wend. (N. Y.) 414.

[2] Leitz v. Mitchell, 94 U. S. 580.

[3] Buddinger v. Wiland, 10 Atl. Rep. 202.

this fact and would receive from the wife no better title than she had, and if she could not defend the same neither could he. But the phase of the subject we are now considering does not involve any questions arising under such facts. Where a purchaser buys from the wife without knowledge of any weakness in her title, and there is nothing to affect him with notice of any defect or latent equity except the single fact that, at the time of his negotiations with her, her husband is insolvent, even though it be conceded that this was sufficient to have put him on inquiry, such inquiry would ordinarily have disclosed nothing beyond the fact that the wife had herself paid for the property.

Circumstances amounting to mere suspicion of fraud are not to be deemed notice; and where an inference of notice is to affect an innocent purchaser, it must appear that the inquiry suggested would have, if fairly pursued, resulted in the discovery of the defect, where the title of the wife does not come through a conveyance from the husband, and is in form perfect, although impeachable by his creditors. If, therefore, the proof shows that the statements of the wife's grantor's, if inquiry had been made, would have been that the consideration for the property was paid by the wife and not by her husband, the duty of inquiry, if any existed, is excused, and the purchaser will hold the property as against the claims or equities of the husband's creditors.

The principle may be considered as well settled that even though the husband pays the consideration and causes the conveyance to be taken in the name of his wife, with intent to hinder and delay his creditors, the title of a subsequent purchaser who had no notice of the fraud and who paid a valuable consideration cannot be disturbed.[1]

§ 27. Expenditures and improvements on wife's land by husband. In strong analogy to the doctrines and principles discussed in the preceding paragraphs is that phase of the subject under consideration which relates to expenditures of money or labor made by an insolvent husband upon the real property of the wife. Many devices are resorted to by insolvents to retain the practical benefits of rich and luxurious living and at the same time escape the burdens and liabilities which naturally at-

[1] Jewett v. Meech, 101 Ind. 289; Willis v. Thompson, 93 Ind. 62.

tach to a person in apparently affluent circumstances. Not the least of these is the practice of placing real estate in the wife's name and then devoting to it the gains and earnings of the husband.

The rule seems to be that where a husband expends money upon his wife's real estate in order to cover and conceal the same and with intent thereby to keep it from his creditors, if she knows of such intent and colludes with him to effect that purpose she occupies practically the position of a fraudulent grantee, and is a trustee for the creditors and accountable to them in equity to the extent of the money so expended, whether it remain in the land or is afterwards converted by a sale into money which she retains.[1] Where, however, the amount so expended by him, with his other personal property, is of less value than the amount which the law exempts from execution in his hands, her estate will not be charged;[2] for, as the reason of the rule then fails, the rule itself will not apply. If the husband's power of disposition is not restricted as to the creditors they cannot complain, as no wrong is done to them. A man may do what he will with property which is his own, free from the claims of creditors; and where such disposition does not hinder, delay or defraud creditors it is immaterial to them what shape the disposition may take.[3]

So, also, the bestowal of personal labor in improving the separate estate of the wife will not constitute her a debtor, nor can her estate be charged therewith in favor of the husband's creditors. The reason for this is that personal labor is not the subject of compulsory sale for the payment of debts. It is not susceptible of seizure, nor can the auxiliary jurisdiction of equity operate upon it; and as a decree *in personam* could not in such case be rendered against the wife, a court of equity is powerless to appropriate the value of the labor to the satisfaction of the claims of creditors.

§ 28. **Property paid for with wife's earnings.** By the rules of the common law marriage is an absolute gift to the husband of all the wife's chattels in possession, and of her

[1] Blair v. Smith, 114 Ind. 114; Nance v. Nance, 84 Ala. 375.

[2] Nance v. Nance, 84 Ala. 375.

[3] Dumbould v. Rowley, 113 Ind. 353; Sannoner v. King, 49 Ark. 299; Buckley v. Wheeler, 52 Mich. 1.

choses in action if he reduce them to possession.[1] The rents and profits of the real estate which accrue during coverture belong to him, as do also any legacies she may receive or any distributive share that may come to her from an intestate estate.[2] He is entitled to her services and the fruits of them, and may appropriate her earnings to himself. Hence, it has been held that a husband cannot give her earnings to his wife as against his creditors.[3] But this doctrine, confessedly harsh and manifestly unjust, has never been favorably received in this country; and many instances may be found where a consent of the husband that the wife's earnings shall belong to her have been upheld,[4] while statutory enactments in recent years have dissolved the legal unity which formerly characterized the relation. While the husband is still entitled to the wife's services, yet, if he voluntarily emancipate her, she will be entitled to receive and retain the fruits of her own labor; and this principle has been held to apply even to matters connected with the household. So if a husband consent that his wife may take boarders into the family, and agrees that she shall have the gross proceeds for application on a contract which he has made with a third person for the purchase of real estate, and if the money so acquired by the wife be thus applied, it has been held that the money is hers, and not his, her right to it being founded on a meritorious consideration; and if, on completing payment, the wife take a conveyance of the premises to herself from such third person, her title will prevail against a creditor of the husband. This would be particularly the case if the property was paid for before the credit was given, though the conveyance to the wife be of later date than the giving of such credit, when it does not appear that the credit was given upon the faith of the specific property. or that the debtor was in possession as apparent owner when the debt was contracted.[5]

Where, however, a wife purchases land or other property the burden is upon her to prove distinctly that she paid there-

[1] Legg v. Legg, 8 Mass. 99; Stanwood v. Stanwood, 17 Mass. 57.

[2] Commonwealth v. Manly, 12 Pick. (Mass.) 173.

[3] Cramer v. Reford, 17 N. J. L. 367.

[4] McLemore v. Pinkston, 31 Ala. 266.

[5] McNaught v. Anderson, 78 Ga. 499.

for with funds not furnished by her husband. Evidence that she purchased amounts to nothing unless it is accompanied with clear and full proof that she paid for it with funds furnished by some one other than her husband. In the absence of such proof the presumption is that her husband furnished the means of payment.[1]

§ 29. From parent to child. Conveyances from parent to child, when voluntary, stand in many respects upon the same footing, and are governed largely by the same rules, that obtain in regard to the same class of conveyances from husband to wife. There is a marked distinction between the children of the grantor and strangers; and a parent may lawfully make gifts to a child, if they are proper and suitable to his circumstances,[2] provided such parent is solvent at the time[3] and there is no actual fraudulent intent.[4] Conveyances of this character are always regarded as meritorious, notwithstanding the want of a valuable consideration, and subsequent contributions of money for the purpose of paying off incumbrances and improving the property will not change their character or render such conveyances void.[5]

But where a parent who is in debt makes a voluntary conveyance to a child with a view to future insolvency, or intending that the property shall be held in secret trust for himself, or for the purpose of placing the property beyond the reach of creditors, such conveyance, being founded in fraud, will not be permitted to stand if assailed.[6]

But if other ingredients enter into the transaction, if a substantial consideration can be shown *aliunde*, and if the cir-

[1] Stockdale v. Harris, 23 W. Va. 499.

[2] Matter of Grant, 2 Story (C. Ct.), 312; Salmon v. Bennett, 1 Conn. 525.

[3] Strawn v. O'Hara, 86 Ill. 53; Smith v. Yell, 8 Ark. 470; Brice v. Meyers, 5 Ohio, 121.

[4] Salmon v. Bennett, 1 Conn. 525; Abbe v. Newton, 19 Conn. 27; Nichols v. Ward, 1 Head (Tenn.), 323; Dood v. McCraw, 8 Ark. 83; Clayton v. Dempsey, 17 Ga. 217; Smith v. Lowell, 6 N. H. 67; Church v. Chapin, 35 Vt. 223.

[5] Herring v. Richards, 3 Fed. Rep. 439.

[6] Carlisle v. Rich, 8 N. H. 44; Wells v. Treadwell, 28 Miss. 717; Pepper v. Carter, 11 Mo. 540; Clayton v. Brown, 17 Ga. 217; Gardner v. Boothe, 31 Ala. 186; Marston v. Marston, 54 Me. 476; Benton v. Jones, 8 Conn. 186; Ringgold v. Waggoner, 14 Ark. 69; Stewart v. Rogers, 25 Iowa, 395; Robinson v. Stewart, 10 N. Y. 189; Rucker v. Abell, 8 B. Mon. (Ky.) 566; Brice v. Meyers, 5 Ohio, 121.

cumstances would render inequitable the annulment of a conveyance from parent to child, then, notwithstanding the parent's condition, if there be no actual fraud the deed may be permitted to stand.[1] If the relation of debtor and creditor exists between father and child, the father may lawfully prefer his own blood, and where the facts conclusively establish such relation the further fact of kinship should not be permitted to militate against it.[2]

§ **30. Parol gifts.** Cases analogous to those which we have just been considering, but depending upon somewhat different principles, are frequently presented where parents have made or attempted to make parol gifts of land to children. In such cases, provided they do not come within the inhibition of the law as stated in the preceding paragraphs, the further objection arises that they are obnoxious to the statute of frauds, and, not being evidenced by writing, for that reason of no effect. In all cases of parol sales from parent to child the utmost strictness of proof is always insisted upon of all those facts which courts of equity have been accustomed to regard as equivalent to a written contract. The very nature of the relation requires a far greater degree of rigidity in the matter of proof than would be necessary as between strangers, and courts have ever been disposed to apply it. But the same facts, or at least a portion of them, which have been conceded as sufficient to remove from the operation of the statute a parol promise to sell, may, it seems, be also relied upon in cases of parol gifts, if otherwise free from defect; and if in such

[1] As where A. deeded land to B. for a nominal consideration expressed in the deed, but the real consideration was, as appeared by proof, an amount due from A. to his daughter, the wife of the grantee, for services, etc., before her marriage, also a life lease from B. to A. in other property, and of love and affection toward his daughter. *Held*, that such a transaction could not be treated as an intent to defraud A.'s creditors, nor was such deed voluntary and without consideration. Seymour v. Briggs, 11 Wis. 196.

[2] Defendants, after coming of age, lived with their father on his farm, many years, until his death. He agreed to pay them $250 a year for their labor. They were engaged constantly in his business, having none of their own. Shortly before his death he conveyed the farm to the sons, though in debt at the time to other persons. *Held*, that there was no fraud in the transaction, and deceased had a right to prefer the debts due his sons to those due strangers. Donly v. Ray (Miss.), 6 South. Rep. 324.

cases the child acquires such an equitable interest in and title to property as that he can hold it against the parent, so also he can hold it against any creditor of the parent.[1] It is true that a mere executory promise, being founded on no consideration, is insufficient to support an action at law, and as a rule incapable of enforcement in equity; yet if the donee, relying on the promise, goes into possession and makes large expenditures on permanent improvements, these in themselves constitute in equity a consideration for the promise, and the gift will be held valid notwithstanding the statute of frauds.[2] The real ground, however, upon which equitable jurisdiction is exercised in such cases, either of sale or of gift, is to prevent a fraud being practiced upon the parol purchaser or donee by inducing him to expend his money in improvements upon the faith of the promise, and then depriving him of the benefit of such expenditures and securing them to the seller or donor.[3]

In every instance the evidence of a parol gift or sale must be direct, positive, express and unambiguous; its terms must be clearly defined, and all the acts necessary to its validity must have special reference to it and nothing else.[4] The evidence should not only be found credible, but of such weight and directness as to make out the facts alleged beyond a doubt,[5] while the boundaries, the quantity of land and the estate conferred must appear by indubitable proof.[6] The further fact must be established that possession was taken in pursuance of the donation at or immediately after the time it was made; that the change of possession was notorious, and has been exclusive, continuous and maintained; while the conditions, if any were annexed, must appear to have been performed or partially performed, so as to leave the donee in a

[1] Burkholder v. Ludlam, 30 Gratt. (Va.) 255; Langston v. Bates, 84 Ill. 524.

[2] Freeman v. Freeman, 43 N. Y. 34; Sowers v. Weaver, 84 Pa. St. 267; Bright v. Bright, 41 Ill. 97; Murphy v. Steel, 43 Tex. 123; Moore v. Small, 19 Pa. St. 468; Manly v. Howlett, 55 Cal. 94; Neale v. Neale, 9 Wall. (U. S.) 1.

[3] Freeman v. Freeman, 43 N. Y. 34; Moore v. Small, 19 Pa. St. 468.

[4] Shellhammer v. Ashbaugh, 83 Pa. St. 24; Poorman v. Kilgore, 26 Pa. St. 365.

[5] Hart v. Carroll, 85 Pa. St. 510; Allison v. Burns, 107 Pa. St. 50.

[6] Hart v. Carroll, 85 Pa. St. 510.

condition which could not be adequately compensated in damages.[1]

With regard to the character and competency of the evidence under the present rule, which permits an interested party to testify in his own favor, the declarations and confessions of the donor may be received; yet such evidence is regarded as among the most unsatisfactory species that can be produced, on account of the facility with which they can be fabricated, the impossibility of contradicting them, and the mistakes and failure of recollection.[2] Parental declarations, particularly, as remarked by Woodward, J., "are often made with reference to experimental arrangements or testamentary intentions for the benefit of a son, which are sadly misapplied when brought into court as evidence of a contract of sale."[3]

§ 31. Deed made to perfect title of parol gift. It is well settled that, where a party has been placed in possession of land, and on the faith of an oral gift of the same to him has made valuable and lasting improvements thereon, this is a sufficient basis upon which the donee may compel a conveyance to him of such land. The transaction is regarded as founded upon a valuable consideration, and the donee therefore stands before a court of equity in the attitude of a purchaser and with equal rights and remedies. So where a father, not being embarrassed, makes an oral gift to a child conditioned on settlement, improvement, etc., and the conditions are duly performed, notwithstanding that financial reverses afterwards change the father's condition, the equities of the child cannot thereby be affected; and if while thus insolvent the father makes a deed designed to perfect the equitable title previously acquired, such deed will be upheld as a valid conveyance, being no more than the donee in equity would be entitled to receive.[4]

§ 32. Ante-nuptial settlement. Conveyances to a wife, made before marriage and in consideration thereof, stand upon a somewhat different ground from post-nuptial conveyances so far as their validity is concerned, and their effect on the rights of creditors is equally marked. Marriage is everywhere con-

[1] Hart v. Carroll, 85 Pa. St. 510; Horn v. Ludington, 32 Wis. 73; Ponce v. McWhorter, 50 Tex. 562.

[2] Moore v. Small, 19 Pa. St. 468.

[3] Moore v. Small, 19 Pa. St. 468.

[4] Dozier v. Matson, 94 Mo. 328.

sidered a valuable consideration for a deed;[1] and if, after the delivery of a deed given as a consideration for a proposed marriage, the marriage actually occurs, the deed is valid so far as the consideration is concerned, and cannot be avoided by the husband's creditors, unless they prove that the grantee herself had knowledge of and participated in the fraud.[2] That the grantor had intended fraud does not affect the merits of the transaction if the grantee herself was innocent.[3]

Marriage, in contemplation of law, is not only a valuable consideration[4] to support such a settlement, but is of the highest value, and from motives of the soundest policy is always to be upheld. In an ordinary transaction which has been vitiated by the introduction of improper elements, the sale may in many instances be set aside and the parties placed in their former positions; but upon the annulment of an ante-nuptial settlement there can follow no dissolution of the marriage which was the consideration for the settlement; and for this reason, if none other, such settlements, though made with a fraudulent design by the settler, should not be annulled or set aside without the clearest proof of the wife's participation in the intended fraud.[5]

§ 33. Ante-nuptial conveyances in fraud of intended consort — By the wife. Upon the ground that intentional concealment or misrepresentation of material facts by which one party is misled to his injury is a fraud, English courts have from an early day been in the habit of interfering in cases of secret voluntary settlements or conveyances of her property by a woman, pending a treaty and in contemplation of marriage, without the knowledge of the intended husband. It will be remembered, however, that by the common law the husband by the marriage became seized of the wife's real property, taking the rents and profits thereof during their joint lives, and by possibility during his own life. While the mar-

[1] Pierce v. Harrington, 58 Vt. 649; Sterry v. Arden, 1 Johns. Ch. (N. Y.) 261; Herring v. Wickham, 29 Gratt. (Va.) 628; Andrews v. Jones, 10 Ala. 400

[2] Smith v. Allen, 5 Allen (Mass.), 454; Verplank v. Sterry, 12 Johns. (N. Y.) 536; Wentworth v. Wentworth, 69 Me. 253; Prewit v. Wilson, 103 U. S. 22; Pierce v. Harrington, 58 Vt. 649.

[3] Prewit v. Wilson, 103 U. S. 22.

[4] Ellinger v. Crowe, 17 Md. 361.

[5] Prewit v. Wilson, 103 U. S. 22.

riage was only in treaty or contemplation, these rights were only in expectation; yet they were regarded as just expectations, forming material inducements to the marriage contract. The acquisition of these rights, therefore, entering into and forming essential inducements to the proposals and contract of marriage, were not permitted to be defeated by secret conveyances made by the wife, which was considered as a violation of that good faith to which parties are bound in respect to all contracts; and disappointing them was the injury which courts interfered to prevent. Hence, conveyances by a woman pending her marriage have been held a fraud upon the marital rights of the husband, and for this reason set aside upon application.

But this rule, while it has been sanctioned by some of the states, has never been of general recognition in this country. It is transatlantic in its origin, and was created to meet the exigencies of laws and systems essentially different from those which now prevail in the United States. In every event such transactions are only *prima facie* fraudulent, and the reported cases canceling such conveyances make the fraudulent intent with which they are made the question to be determined by the jury or the court, and the parties holding under the deed may show that no fraud was intended or practiced on the party complaining.

"If one, when about to consummate a marriage contract," remarks Pryor, J., "should make a voluntary conveyance of his estate, or the greater portion of it, to his children, without the knowledge or consent of his wife, the conveyance would doubtless be of such a character as to make the charge of fraud conclusive to the mind of the chancellor; but to hold that from every conveyance voluntarily made by the intended husband or wife, lessening the value of the interest that one might have in the estate of the other by reason of the marital relation, arises a conclusive presumption of fraud, would often work great injustice, and defeat *bona fide* conveyances made by those whose legal and natural duty requires them to provide for the maintenance and education of their children."[1]

Where a marriage is consummated upon the distinct under-

[1] Fennessey v. Fennessey, 84 Ky. 519.

standing that a settlement shall be made upon the person so consenting — as where a man, as an inducement to the marriage, agrees to settle upon the woman or convey to her certain of his real estate, and upon the faith of such promise she makes an irretrievable change in her condition — the other party will be held to make good the agreement; and any disposition of his property made on the eve of marriage, whereby he disqualifies himself from specifically executing the agreement, will be deemed fraudulent as to the wife, and the conveyance, if made to one with knowledge of the facts, or to a volunteer, will be set aside at her suit. The same rule applies with equal force to either party.[1]

§ 34. Continued — By the husband. While the husband, under the rules of the common law, acquired by the marriage a number of very substantial rights in the real property of the wife, she, on the contrary, acquired no special rights in his property, and hence could not be heard to complain of conveyances or dispositions by the intended husband made on the eve of marriage, even though the intent was to exclude her from dower, and without notice of which she was permitted to consummate the marriage contract. This doctrine, however, has in a number of instances been repudiated in this country, and courts have refused to distinguish ante-nuptial frauds of the husband from those of the wife. It has been said that if the fraud of the woman defeats and disappoints the just expectations of the intended husband, his fraud defeats and disappoints equally her just expectations; that the right of dower is a circumstance which every man must presume the woman expects and intends shall follow the marriage as certainly as other incidents, and that there can be no presumption that she is, less than he, influenced by prudential considerations, or is unmindful, on entering into the contract of

[1] In the case of Green v. Green, 34 Kan. 740, a widow owning one hundred and sixty acres of land orally promised a man that if he would marry her she would devote the proceeds of the land to their joint support. Relying upon this promise he married her, but subsequently ascertained that on the eve of the marriage she conveyed the property to her children by former marriage, "in consideration of love and affection." The court held that he could maintain an action to have the deed set aside on the ground of fraud. Compare, also, Petty v. Petty, 4 B. Mon. (Ky.) 215.

marriage, of acquiring a home in the event of her widowhood, and the means of sustenance for herself and of nurture and education for her children when consigned to orphanage.[1] For these reasons it has frequently been held that conveyances by a man just prior to marriage, or during treaty therefor, without the knowledge of his intended wife, the object being to defeat the interest she would otherwise acquire in his estate, are, as to her, fraudulent and void.[2] Indeed, the weight of American authority makes no distinction between husband and wife in this particular; and the rule which holds that secret and voluntary conveyances made by a woman in contemplation of marriage are liable to be set aside, upon the husband's application, as a fraud upon his marital rights, applies equally to a husband who before marriage makes a secret transfer of his property which results in an injury to the wife.

But the rule is not absolute, however; nor does it entitle the wife to treat every conveyance secretly made by the husband on the eve of marriage as a fraud upon her rights. There may be good reason for the conveyance, and the question in all such cases is as to whether the evidence is sufficient to show fraud. The secrecy of the conveyance, while it may be an important circumstance, does not necessarily show fraud; and in many cases where land has been conveyed by a father to his children by a former marriage immediately pending the consummation of a second marriage, such conveyances have been upheld as meritorious and fair. Where the circumstances clearly rebut any inference of actual fraud, and the conveyance is founded upon a good or meritorious consideration, or where the grantee has been placed in such a position that he would have been entitled to a specific performance in exclusion of the wife's dower rights, courts will usually refuse to interfere to annul the conveyance or to impress the land with any rights in favor of the wife.[3] So, also, if the husband was under

[1] Kelly v. McGrath, 70 Ala. 75.

[2] Dearmond v. Dearmond, 10 Ind. 191; Brown v. Bronson, 35 Mich. 415; Smith v. Smith, 12 Cal. 217; Swain v. Perine, 5 Johns. Ch. (N. Y.) 489; Thayer v. Thayer, 14 Vt. 107; Reynolds v. Vance, 1 Heisk. (Tenn.) 344.

[3] See Firestone v. Firestone, 2 Ohio St. 415; Gaines v. Gaines, 9 B. Mon. (Ky.) 295; Thayer v. Thayer, 14 Vt. 107; McIntosh v. Ladd, 1 Humph. (Tenn.) 459.

legal duty to make the conveyance for the reasons just stated, or for any other reasons which the law recognizes, notwithstanding the husband failed to disclose it to the wife before marriage, she might still be unable to assert her dower interests on the ground that the conveyance was a fraud upon her rights. The general doctrine is that the dower right is subject to every lien or incumbrance at law or in equity existing before it attaches; and in accordance with this doctrine it has frequently been decided that a conveyance similar to those now under consideration, made for the purpose of carrying out a previous valid contract of sale, is good against a claim of dower. The right of dower, it has been said, arises only on the title of the husband, and cannot be higher or more extensive.[1]

It would seem, therefore, as the substance of the decisions upon this subject, that for the husband before marriage, to convey the whole or the greater part of his estate away, without the knowledge of the wife, is a fraud upon her rights; that where any such conveyances are voluntarily made without the knowledge of one of the contracting parties, it presents a *prima facie* case of fraud, subject to be explained by the parties interested, and the burden is on the grantees to establish the validity of the deed; that advancements may be made by the parent to a child when such advancements are reasonable in view of the estate owned by him, and unless an actual intent to defraud is made to appear the settlement will be upheld.

§ 35. **Pleading and proof.** Want of notice is a matter of defense which the party alleging must aver by way of defense and establish by proof, and the burden in all cases is upon him.[2] To obtain relief in equity as a *bona fide* purchaser he must positively and unequivocally deny all notice, even though

[1] In Firestone v. Firestone, 2 Ohio St. 415, the husband before marriage agreed, for a consideration partly good and partly valuable, to convey land to his son, who paid the valuable consideration and took possession. It was held, under a conveyance to the son after marriage, that no right of dower attached as against his equity.

[2] Cunningham v. Erwin, Hop. Ch. (N. Y.) 48; Jewett v. Palmer, 7 Johns. Ch. (N. Y.) 65; Lincoln v. Thompson, 75 Mo. 638; Makepeace v. Davis, 27 Ind. 355.

it is not charged;[1] he must also deny all knowledge of facts charged from which notice may be inferred,[2] and of every circumstance tending to show the same.[3] This denial must be full, positive and precise;[4] and if he relies upon want of notice in another from whom he purchased he must still aver the fact by plea or otherwise.[5]

On the other hand, it is the settled policy of the law to give security to and confidence in titles to the landed estates of the country which appear of record to be good; and it is well established by an unbroken current of authority that where it is sought to defeat a clear legal title of record by one having a mere equity, on the ground that the equities of the latter were known to the former at the time of acquiring the legal estate, the allegation of notice must be made and established by clear and satisfactory proof. The evidence should leave no reasonable doubt of the fact of notice.[6]

But while the evidence should be of a clear and unequivocal character, and as far as possible positive and direct, yet circumstantial evidence is sufficient, and in many cases the only proof that can be adduced.[7] Circumstances altogether inconclusive, if separately considered, may by their number and joint operation be sufficient to constitute conclusive proof.[8]

It is the rule that the fraudulent intent must always be established by satisfactory proof; yet where the facts disclosed create a strong doubt of the integrity of the transaction between vendor and vendee, they throw on the vendee the duty of making a full explanation and the burden of proof to sustain it.[9] Primarily, however, upon proof of the payment of a valuable consideration by the subsequent purchaser, the burden of proving his bad faith and his knowledge of outstand-

[1] Frost v. Beekman, 1 Johns. Ch. (N. Y.) 300; Denning v. Smith, 3 Johns. Ch. (N. Y.) 345.

[2] Cunningham v. Erwin, Hop. Ch. (N. Y.) 48.

[3] Lincoln v. Thompson, 75 Mo. 638.

[4] Denning v. Smith, 3 Johns. Ch. (N. Y.) 345.

[5] Cunningham v. Erwin, Hop. Ch. (N. Y.) 48.

[6] McVey v. McQuality, 97 Ill. 93.

[7] Rea v. Missouri, 17 Wall. (U. S.) 532. Circumstantial evidence of fraud is often of more force than direct testimony. Kempner v. Churchill, 8 Wall. (U. S.) 362.

[8] Castle v. Bullard, 23 How. (U. S.) 172.

[9] Clements v. Nicholson, 6 Wall. (U. S.) 299.

ing equities at the time of his purchase rests upon the holder of the prior equities.[1]

It would seem that insufficiency of property is a necessary allegation in an action to set aside a conveyance as fraudulent, and that the plaintiff should prove that at the time the deed was executed the grantor did not have other property left subject to execution sufficient for the payment of all his existing debts.[2]

§ 36. **Effect of adjudication of fraud.** It is a rule of general application that a judgment is conclusive as an estoppel only upon the parties or their privies, and the record of a former judgment or adjudication cannot be introduced to affect the rights of a stranger to the proceedings.[3] In pursuance of this rule an adjudication that a conveyance of real estate is fraudulent as against certain creditors of the grantor affects the title of the grantee only so far as such creditors are concerned who were parties to the proceeding in which such adjudication was had. Other creditors not parties cannot avail themselves of it.[4]

[1] Morris v. Daniels, 35 Ohio St. 406; McVey v. McQuality, 97 Ill. 93.

[2] Pfeiffer v. Snyder, 72 Ind. 78.

[3] Stoddard v. Burton, 41 Iowa, 585.

[4] Huntington v. Jewett, 25 Iowa, 249.

CHAPTER XXVI.

INCUMBRANCES.

§ 1. General observations.
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3. Conveyance subject to mortgage.
4. As between vendor and vendee.
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28. Mortgage estate converted into money.
29. Mortgages given prior to investure of title.
30. Estoppel of mortgage.
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32. Lands held under contract.
33. Merger.
34. Deed with contract to reconvey.
35. Absolute conveyance, when treated as a mortgage.
36. Property subject to judgment.

§ 1. General observations. Conveyances are frequently made where the subject-matter is burdened by a lien or charge, and the rights of the parties in transactions of this kind require some notice in a work treating of the alienation of real property. The charge may consist of some burden or obligation imposed by the act of the parties, as a mortgage, lease,

etc., or by some involuntary lien raised and existing by operation of law or the decree of some competent court; but in either case the respective rights and duties of the parties to a contract for the sale of such incumbered property are not materially changed. The incumbrance of most frequent occurrence is by way of mortgage, and the succeeding paragraphs of this chapter will be largely devoted to a discussion of such of the different phases of this topic as properly come within the scope of this work.

It would seem that the common law recognized two kinds of landed security, known respectively as *vivum vadium* and *mortuum vadium*. The former consisted of a feoffment to the creditor and his heirs until out of the rents and profits the debt had been satisfied. The creditor in such case took actual possession of the estate, and received the rents and applied them to the liquidation of the debt; when it was satisfied or paid the debtor might re-enter, and if necessary maintain ejectment. This species of pledge is said to have been called *vivum vadium* because neither the debt nor estate was lost. It is said, however, that this mode of security was not very general, and was in time superseded by the *mortuum vadium* or mortgage, so called because on breach of condition the estate was rendered indefeasible in the mortgagee, and absolutely lost or dead to the mortgagor. Upon the execution of such a mortgage the legal estate vested in the mortgagee, subject to be defeated by the performance of the condition. The time appointed for the payment of the money to secure which the mortgage was given became known in legal parlance as the "law-day,"[1] and if tender or payment was not made at that time according to condition the estate became absolute and indefeasible in the mortgagee; and by the strict rules of the common law, all interest or right therein of redemption passed from the mortgagor. But in the contemplation of equity, the absolute forfeiture of an estate on breach of the condition was regarded as a flagrant injustice and hardship, although perfectly accordant with the system on which the mortgage itself was founded. Equity, therefore, early interfered to moderate the severity of the common law, and, leav-

[1] Because after default the legal rights of the mortgagor were extinguished.

ing the forfeiture to its legal consequences, operated on the conscience of the mortgagee — acting *in personam* and not *in rem* — and declared it unreasonable that he should retain for his own benefit what was intended merely as a pledge. To effect the object of its interference equity then adjudged that the breach of the condition was in the nature of a penalty which ought to be relieved against, and that the mortgagor had an equity to redeem on payment notwithstanding the forfeiture at law.[1]

Notwithstanding that a mortgage in form still purports to convey a present legal estate to the mortgagee, liable to be defeated only by the performance of stipulated conditions, yet the modern doctrine is that it is but a lien on land by way of security for a debt, and that the legal title remains in the mortgagor subject only to the lien;[2] that the right a mortgagee has to hold the mortgaged premises as security for his debt is not an estate in the land, and passes only by an assignment of the debt.[3] The estate remaining in the mortgagor after the law-day[4] has passed, or at any time before foreclosure, is still popularly but erroneously called an "equity of redemption," retaining the name it had when the legal estate was in the mortgagee, and the right to redeem existed only in equity;[5] but the words "redemption" and "equity of redemption" are all that survive, the ideas they once represented having long since become obsolete. The same is the case with reference to the word "forfeiture," so often used in connection with this subject; there is now no forfeiture of a mortgaged estate, and until foreclosure the right of the mortgagor is the same the day after default that it was the day before.

[1] From this grew up the system of filing bills in equity by the mortgagee to foreclose and cut off this right of redemption in the mortgagor.

[2] Vason v. Ball, 56 Ga. 268; Wing v. Cooper, 37 Vt. 169; Fletcher v. Holmes, 32 Ind. 497; Carpenter v. Bowen, 42 Miss. 28; Woods v. Hildebrand, 46 Me. 284.

[3] Mack v. Wetzlar, 39 Cal. 247.

[4] The term "law-day" once very expressively marked the time when all legal rights were lost by the mortgagor's default, but now there is no such time until foreclosure by a judicial sentence or under a power of sale.

[5] An equity of redemption, either technically or in popular parlance, is an estate in the land itself, which may be devised, granted and charged with the payment of other debts of the mortgagor or owner of such equity of redemption.

A mortgage is now regarded as a mere incident of the debt it was given to secure, and an assignment of the debt will, in equity at least, carry with it the mortgage.

§ 2. **Duty of purchaser of mortgaged property.** One of the most common incidents attending the transfer of real estate is for the purchaser to take his title incumbered by the lien of a prior mortgage; and usually his first efforts in respect to such title are directed toward its removal. His duty on such occasions, as well as the method of its performance, would on first view seem extremely clear and simple; yet the questions raised by his position, apparently, are but imperfectly understood by a large portion of the profession. At least this is the inference to be drawn from a perusal of the reported cases, and is well illustrated by a recent decision of the United States circuit court for Kansas.[1] The statement of facts shows that A. executed to B. a negotiable bond, due in five years, and, as security for the same, a mortgage on his land. The mortgage was placed upon record and soon thereafter sold and transferred to another, who in turn sold it to the plaintiff; but no evidence of the sale or assignment was entered of record, and so far as the records disclosed the original mortgagor still remained the owner. A. in the meantime sold the land subject to the mortgage, and by mesne conveyances it passed into the hands of the defendant, who had no knowledge of the sale or transfer nor other information concerning the mortgage than that afforded by the record. Now here was a state of facts that finds a counterpart every day in every state of the Union. The defendant did what hundreds of others have done under similar circumstances. He went to the mortgagee, who, representing himself as still the holder and owner of the mortgage, agreed to satisfy and release the same upon payment of the mortgage debt; and the defendant relying upon his statements and the condition of the records, paid the money and had the mortgage released of record by the mortgagee. Subsequently suit was brought to foreclose by the true owner of the securities, and upon the application of the law to these facts the case turned, resulting in a finding for the plaintiff.

[1] Windle v. Bonebrake, 23 Fed. Rep. 165.

So far as the registry of deeds is concerned a purchaser undoubtedly has a right to rely with confidence upon what is there disclosed, and is only chargeable with notice of such facts as appear of record;[1] yet he must, at his peril, observe as well the legal effect of such facts and duly prosecute any inquiry they may suggest.[2] Where a purchaser finds the record of a mortgage released and satisfied by the mortgagee, the general rule seems to be that he may, provided he has no actual knowledge of any assignment or non-payment of the debt, rely upon the record, and in such case would take the land freed from the incumbrance, even though the record may have been released by fraud, accident or mistake;[3] while with respect to the necessity of registration for priority of title it has often been held that the same general rules prevail between different assignees of a mortgage as between grantees in ordinary deeds.[4]

It may be, however, that the undoubted potency of the rules last stated and their general knowledge by the profession has led to misconceptions of the position of a purchaser who finds a mortgage unsatisfied of record and to imperfect ideas in regard to his duty under such circumstances. In this latter event he naturally turns to the mortgagee of record when desirous of having the mortgage released; and, if he has no knowledge of any sale or transfer of the mortgage, or of the notes or bonds which it was given to secure, will usually experience no hesitancy in paying the debt to the record mortgagee and taking his release of the mortgage.[5] Yet it must

[1] Disque v. Wright, 49 Iowa, 538; Herman v. Deming, 44 Conn. 124; Bullock v. Battenhousen, 108 Ill. 28; State ex rel. Lowry v. Davis, 69 Ind. 589. And this, even though there has been a mistake in recording. Beekman v. Frost, 18 Johns. (N. Y.) 544.

[2] Cambridge Bank v. Delano, 48 N. Y. 326; Wilson v. Hunter, 30 Ind. 466. And see 1 Story, Eq. § 399, and cases cited.

[3] Mitchell v. Burnham, 44 Me. 303; Johnson v. Carpenter, 7 Minn. 176; Purdy v. Huntington, 42 N. Y. 334; Cornog v. Fuller, 30 Iowa, 212; Baldwin v. Sager, 70 Ill. 505; Ayers v. Hays, 60 Ind. 452; Ins. Co. v. Eldredge, 102 U. S. 545; Bacon v. Van Schoonhoven, 87 N. Y. 446.

[4] Wiley v. Williamson, 68 Me. 71; Trust Co. v. Shaw, 5 Sawyer (C. Ct.), 336.

[5] The security felt by the purchaser in instances similar to the foregoing has been augmented in many states by a statute which declares that the recording of an assignment of a mortgage does not of itself impart notice to the mort-

be remembered that, under the application of the rules just stated, the record which will protect a subsequent purchaser is the record as he finds it, and not as he makes it or procures it to be made.[1]

Mortgages given to secure the payment of a debt are now universally regarded as mere incidents to the debt and partaking of its negotiability;[2] hence, it would naturally follow that while its negotiable character exists, a purchaser or assignee would take the security as he does the debt to which it is incident, free of equities and defenses subsisting between the original parties. Where, therefore, the record discloses an unsatisfied mortgage, the debt not due, and a negotiable obligation outstanding for which the mortgage was given to secure, a purchaser of the incumbered property is charged with notice of all the record shows at the time of his purchase. Ordinary caution, in such case, requires him to obtain the surrender of the note or obligation; and the fact that the mortgagee does not produce it is a circumstance which should put the purchaser on inquiry.[3]

It will be seen that a case similar to that under consideration is not governed by the rule created by the recording acts in the case of purchasers who take conveyances of real estate relying upon the satisfaction of a prior mortgage made by a third party. Such a purchaser has no occasion to call for the production of the mortgage which has been satisfied, or of the obligation which accompanied it. He is neither the debtor, who should see that his own obligation is canceled when he pays the debt, nor is he the purchaser of the obligation, who should obtain possession of the securities which he purchases. He has no right to the canceled instrument, and no occasion for it; and it cannot be that he is bound to suspect fraud when he sees that the mortgage has been satisfied by the party who stands upon the record as its owner and en-

gagor, so as to invalidate any payment made by him to the mortgagee.

[1] Windle v. Bonebrake, 23 Fed. Rep. 165.

[2] Carpenter v. Longan, 16 Wall. (U. S.) 271; Kellogg v. Smith, 26 N. Y. 20; Burhans v. Hutcheson, 25 Kan. 625; Keohane v. Smith, 97 Ill. 156.

[3] Brown v. Blydenburgh, 7 N. Y. 141; Keohane v. Smith, 97 Ill. 156; Windle v. Bonebrake, 23 Fed. Rep. 165; and see Bank v. Anderson, 14 Iowa, 545.

titled to satisfy it.[1] But a purchaser who buys subject to a mortgage or who assumes the same as part of the consideration for the land, occupies for all practical purposes the position of the mortgagor; and where a mortgagor pays or satisfies the mortgage debt by a dealing between himself and the mortgagee, it is gross carelessness on his part not to require the production of the papers, or some evidence that the mortgagee still holds the same, where the debt is evidenced by a negotiable writing and the time for its maturity has not arrived.

A slightly different question is presented in a case where the purchaser, finding property incumbered, refuses to consummate the purchase until the incumbrance shall have been discharged; and while, in view of the foregoing doctrine, the question may be involved in some doubt where the vendor procures and gives to the purchaser a release or satisfaction, yet it seems that if the purchaser advances his money on the faith of the release he stands in the position of a *bona fide* purchaser of the mortgaged premises within the provisions of the recording acts. Under the rule as generally laid down, a purchaser will be entitled to protection, and as to him the mortgage will be deemed to be discharged, where the release or satisfaction is of record before he advances his money and receives a conveyance; and it has been held that there is no substantial distinction between that circumstance and the one under consideration: that if the purchaser advances his money on the faith of an instrument to which he was entitled and had the power to put on record, and which, as the record then stood, was effectual to discharge the mortgage, he is entitled to the protection of the recording act to the same extent as if the papers had been placed of record before advancing his money. This doctrine, while it may seem to conflict in some points with that first stated, is in full accord with the rules of law in those states where assignments of mortgage are considered as conveyances within the recording acts, and if not recorded, are void, not merely as against subsequent purchasers of the same mortgage, but also as against subsequent purchasers of the mortgaged premises, whose interests may be affected by such assignments, and whose conveyances are first recorded.[2]

[1] Bacon v. Van Schoonhoven, 87 N. Y. 446.

[2] Bacon v. Van Schoonhoven, 87 N. Y. 446; Decker v. Boice, 83 N. Y. 215.

§ 3. Conveyance subject to mortgage. In every conveyance of land which has prior thereto been pledged as security for the payment of a debt, whether the deed recites this fact or not, the land in the hands of the purchaser is regarded as a primary fund for the payment of the mortgage, provided that notice of the existence of such mortgage has been imparted by any of the methods authorized or sanctioned by law. The acceptance of a deed containing words importing an obligation on the part of the purchaser to pay a mortgage which is a lien upon the land, and which in some definite manner is referred to in the deed, imposes upon him an engagement to do so[1] — such acceptance binding him as effectually as though the deed had been made *inter partes*, and had been executed by both grantor and grantee;[2] but the mere fact that property is conveyed "subject" to a mortgage creates no liability on the part of the grantee to pay off such incumbrance and discharge the mortgage debt.[3] The insertion of such a stipulation imports no intention on the part of either party to create a personal obligation;[4] and while the land remains primarily liable for the entire charge, yet the grantor alone, if he be the party who created the incumbrance, must be held to respond for any deficiency after foreclosure sale duly and fairly made.[5] To create an obligation of this character there must be some special contract, and the language employed should clearly import an assumption of liability. In the absence of other evidence a deed made subject to mortgage shows that the vendee has

[1] Atlantic Dock Co. v. Leavitt, 54 N. Y. 39; Thayer v. Marsh, 75 N. Y. 342; Steiger v. Mahone, 24 N. J. Eq. 426; Boardman v. Larrabee, 51 Conn. 39.

[2] Trotter v. Hughes, 12 N. Y. 74; Crawford v. Edwards, 33 Mich. 359; Huyler v. Atwood, 26 N. J. Eq. 504; Adams v. Similie, 50 Vt. 1; Dean v. Walker, 107 Ill. 540.

[3] Lewis v. Day, 53 Iowa, 579; Trotter v. Hughes, 12 N. Y. 74; Fiske v. Tolman, 124 Mass. 254; Merriman v. Moore, 90 Pa. St. 78; Hall v. R'y Co. 58 Ala. 10; Tichenor v. Dodd, 18 N. J. Eq. 451; Dunn v. Rodgers, 43 Ill. 260; Winans v. Wilkie, 41 Mich. 264; Campbell v. Patterson, 58 Ind. 66; Tanquay v. Felthausen, 45 Wis. 30; Johnson v. Monell, 13 Iowa, 300.

[4] Hall v. Morgan, 79 Mo. 47; Patton v. Adkins, 42 Ark. 197; Rapp v. Stoner, 104 Ill. 618; Hubbard v. Ensign, 46 Conn. 576; Lawrence v. Towle, 59 N. H. 28; Fiske v. Tolman, 124 Mass. 254.

[5] Johnson v. Zink, 51 N. Y. 333; Gayle v. Wilson, 30 Gratt. (Va.) 166; Comstock v. Hitt, 37 Ill. 512; Hall v. Alexander, 26 Iowa, 569; Winans v. Wilkie, 41 Mich. 264; Campbell v. Patterson, 58 Ind. 66.

merely purchased the equity of redemption. It is true he is interested in its payment, because it is an incumbrance upon land of which he is the owner; but he is under no obligation to pay it, and if he parts with his title he no longer has any interest in its payment.[1]

It would seem to have been the doctrine of the earlier cases that, in general, a conveyance subject to a mortgage is held to mean "subject to the payment of such mortgage," unless there be something to indicate a different intention;[2] but this doctrine no longer obtains anywhere, and the most that can be predicated upon such a clause is that, as the land has been sold expressly subject to the mortgage, the vendee is under obligation to recognize it as an existing lien.[3]

Nor does it seem that the introduction of language reciting that the amount of the mortgage debt or other incumbrance has been estimated as part of the consideration and deducted therefrom can have any effect to create a personal liability on the part of the grantee, although the authorities do not furnish any guide which is entirely satisfactory in the solution of this question. The cases all agree that the purchase of a mere equity of redemption, without any words in the grant importing an assumption of the debt, will not bind the grantee to pay the same, and that the law will not raise an obligation where none is in terms expressed. On the other hand, it is equally well settled that the acceptance of a deed containing a clause importing a promise of payment or an agreement of assumption will be considered equivalent to an express undertaking on the part of the grantee, notwithstanding he does not sign or seal the instrument, and that precise and formal words are not necessary to create the obligation. The inquiry would seem to be, therefore, What was the intention of the parties?

But little importance can or should be attached to the con-

[1] Fiske v. Tolman, 124 Mass. 254; Smith v. Truslow, 84 N. Y. 660; and see Johnson v. Monell, 13 Iowa, 300; Tichenor v. Dodd, 18 N. J. Eq. 454; Tanquay v. Felthausen, 45 Wis. 30; Fowler v. Fay, 62 Ill. 375; Dunn v. Rogers, 43 Ill. 260; Moore's Appeal, 88 Pa. St. 450; Strong v. Converse, 8 Allen (Mass.), 557.

[2] Jumel v. Jumel, 7 Paige (N. Y.), 591; Halsey v. Reed, 9 Paige (N. Y.), 446; and see Canfield v. Shear, 49 Mich. 313.

[3] Henderson v. Bellew, 45 Ill. 325.

sideration clause, or indeed to any recital of the amount paid. It is the usual custom of conveyancers to state the whole sum of the consideration or purchase price, whether it is all to be paid down or whether part is to remain as a prior charge upon the land; and this practice is so frequent and indiscriminate that no inference favorable to the creation of a personal liability can, as a general rule, be drawn from its adoption.[1] Nor will the introduction or use of such language in the *habendum* materially alter the case; for, if the deed is made with covenants, a recital of some kind is necessary to qualify those covenants; and where in addition to a statement that the land is conveyed subject to an existing mortgage there is a further statement that the sum of the mortgage debt has been estimated as a part of the purchase money and deducted therefrom, it may be justly regarded as a mere matter of greater caution. It imports nothing more than that the grantee has purchased the equity of redemption, and its apparent meaning is that so much of the purchase money as the mortgage amounts to, being deducted, is not to be paid, except as it is charged upon the land.[2]

§ 4. **As between vendor and vendee.** It would seem that where parties have made and concluded an agreement and have reduced the same to writing, the terms of such agreement, if plain and unambiguous, should be allowed to govern according to their import; that no other or different duties should be imposed upon the parties or their obligations extended by implication. Indeed, such is the rule of construction ordinarily adopted in the interpretation of contracts and conveyances relating to land, and is the only rule that can with safety or propriety be applied. Hence, where a purchase deed simply recites that the conveyance is made subject to an existing incumbrance, such recital should be regarded merely as a notice to the purchaser that he is buying only the equity of redemption, and as a qualification of the covenants of the grantor. If more is intended it should be made affirmatively to appear, and if it is agreed that the grantee is to assume any liability either toward his grantor or any other person, a fair

[1] Belmont v. Coman, 22 N. Y. 438. Lewis v. Day, 53 Iowa, 579. Com-
[2] Belmont v. Coman, 22 N. Y. 438; pare Thayer v. Torry, 37 N. J. L. Remsen v. Beekman, 25 N. Y. 560; 314.

interpretation of the rules of law would seem to demand that such agreement be set forth with the same degree of certainty as is required in other parts of the contract of sale.

So far as respects the demands of third persons the law seems fairly well established, notwithstanding the apparent strain to which equitable principles have been subjected in some of the reported cases, in attempts to make the grantee do something which he never agreed to do. But as respects the relation of the parties as between themselves, the question seems to be involved in some doubt. It would seem that, where a purchaser receives title "subject" to a mortgage or other incumbrance, he simply takes the land *cum onere*, but is himself burdened with no obligation to discharge it or to indemnify or save his grantor harmless therefrom; and where no covenant of indemnity is expressed, courts have no right to raise one by implication.

The question then arises, Can the parties as between themselves be held to any implied contract with reference to the mortgage debt? It would seem to be the English rule that the purchaser of even an equity of redemption is, in equity, held liable to indemnify his grantor against ever paying the incumbrance, whether he so stipulates to do or not.[1] This results from the presumption that the grantor has allowed the grantee to retain the amount of the mortgage debt as a deduction from the purchase money, and that, as he has bought the property just so much cheaper, an obligation is raised in conscience to indemnify and save the grantor harmless therefrom. It is difficult, however, to see how a court of equity could raise such an obligation upon the conscience of a purchaser whose undertaking is defined by a written contract in terms which practically exclude the existence of such an obligation, which is certainly the case where the deed simply recites that the conveyance is made subject to incumbrance, but without covenants, either of assumption or indemnification.

It has been held that the mere fact that a purchaser of lands takes subject to a mortgage does not render him liable, either legally or equitably, to indemnify his grantor against the mortgage,[2] and that simply deducting the amount of a

[1] Waring v. Ward, 7 Ves. 333; Evelyn v. Evelyn, 2 P. Wms. 664.

[2] Smith v. Truslow, 84 N. Y. 660.

mortgage from the purchase price on a sale of land does not, in the absence of a special agreement to pay, absolutely impose upon the grantee the duty of paying;[1] yet it would seem that where the mortgage debt forms a part of the consideration of the purchase, the vendee is bound, at least to the extent of the property, to indemnify the grantor against the latter's personal liability to pay the mortgage, notwithstanding there may have been no express agreement to that effect.[2] It is contended that the nature of this transaction raises an implied promise on the part of the purchaser to save the grantor harmless, although it has also been held that such liability will not extend beyond the value of the land, and that the purchaser may release the lands to the mortgagor and thus discharge his obligation to indemnify.[3]

§ 5. **Assumption of mortgage by purchaser.** It is now settled beyond controversy that where a grantee accepts a deed purporting to be subject to mortgage incumbrance upon the property conveyed, and which contains a clause reciting that the grantee assumes or agrees to pay such mortgage, he thereby becomes personally liable for the debt so secured, not only to his grantor on his agreement, but to the mortgagee as well, and on default of payment a personal judgment may be rendered against him for the breach of the agreement;[4] or, if he be made a party to a suit to foreclose such mortgage, a decree may be entered holding him personally liable for any deficiency that may exist after the foreclosure sale.[5] By

[1] Bennett v. Bates, 94 N. Y. 354.

[2] See Wood v. Smith, 51 Iowa, 156; Moore's Appeal, 88 Pa. St. 450; Townsend v. Ward, 27 Conn. 610; Thompson v. Thompson, 4 Ohio St. 333.

[3] Tichenor v. Dodd, 4 N. J. Eq. 454.

[4] Flagg v. Geltmacher, 98 Ill. 293; Snyder v. Robinson, 35 Ind. 311; Schmuker v. Sibert, 18 Kan. 104; Thorp v. Keokuk Coal Co. 48 N. Y. 253; Meach v. Ensign, 49 Conn. 191 (by virtue of statute); Merriman v. Moore, 90 Pa. St. 78; Crawford v. Edwards, 33 Mich. 354. As a rule, however, suits at law upon the promise are not encouraged and in some states not permitted; for although the promise is made for the ultimate benefit of the mortgagee, yet primarily it is for the benefit of the grantor, in whom the right to legal action rests. The mortgagee is usually only allowed to take advantage of the promise in equity in a suit to foreclose. See Bank v. Rice, 107 Mass. 37; Gantzert v. Hoge, 73 Ill. 30; Crowell v. Currier, 27 N. J. Eq. 152; Osborne v. Cabell, 77 Va. 462.

[5] Burr v. Beers, 24 N. Y. 178; Crawford v. Edwards, 33 Mich. 354; Thompson v. Bertram, 14 Iowa, 476;

the purchaser's covenant of assumption he is held to have become the principal debtor, his grantor retaining only the character of surety,[1] while the mortgagee becomes entitled to the benefit of their contract, upon the principle that a creditor is entitled by equitable subrogation to all securities held by a surety of the principal debtor.[2] The right of the mortgagee to hold the grantee for the deficiency does not rest upon the theory of a contract between the purchaser and the mortgagee, but on the ground that the covenant of the purchaser is a collateral security obtained by the mortgagor which by equitable subrogation inures to the mortgagee,[3] upon the well-recognized principle that a creditor is entitled to the benefit of all collateral obligations for the payment of the debt which a person standing in the situation of surety for others has received for his indemnity, and to relieve him or his property from liability for such payment.[4] Such, at least, is the theory framed by the earlier decisions and still retained in most of the states, although more recent cases in some localities have swept away many of the niceties and refinements which formerly characterized this branch of the law, and the liability of the purchaser has been placed upon the broad ground that, where one person makes a promise to another for the benefit of a third person, such third person may himself take advantage of the promise and maintain an action upon it.[5] In such a case it is not necessary that there should be any consideration passing from the third person, for it is sufficient if

Thompson v. Dearborn, 107 Ill. 187; Ellis v. Johnson, 96 Ind. 377; Converse v. Cook, 8 Vt. 164; Hoff's Appeal, 24 Pa. St. 200; Stiger v. Mahone, 24 N. J. Eq. 426; Cooper v. Foss, 15 Neb. 515.

[1] Corbett v. Waterman, 11 Iowa, 86; Osborne v. Cabell, 77 Va. 462; Marshall v. Davies, 78 N. Y. 414; Boardman v. Larrabee, 51 Conn. 39; Flagg v. Geltmacher, 98 Ill. 293; Wilson v. Burton, 52 Vt. 394; George v. Andrews, 60 Md. 26.

[2] Crowell v. Currier, 27 N. J. Eq. 152; Biddle v. Brizzolara, 64 Cal. 354; Russell v. Pistor, 7 N. Y. 171.

[3] Hoy v. Bramhall, 19 N. J. Eq. 570; Coffin v. Adams, 131 Mass. 137; Osborne v. Cabell, 77 Va. 462.

[4] Halsey v. Reed, 9 Paige (N. Y.), 446; Trotter v. Hughes, 12 N. Y. 74; Biddle v. Brizzolara, 64 Cal. 354; Crowell v. Currier, 27 N. J. Eq. 152.

[5] Campbell v. Smith, 71 N. Y. 26; Hand v. Kennedy, 83 N. Y. 149; Ross v. Kennison, 38 Iowa, 396; Center v. McQueston, 24 Kan. 480; Comstock v. Hitt, 37 Ill. 542; Fitzgerald v. Barker, 70 Mo. 685; McDowell v. Laer, 35 Wis. 171.

the promise be made by the promisor upon a sufficient consideration passing between him and his immediate promisee; and when the third person adopts the act of the promisee in obtaining the promise for his benefit, he is brought into privity with the promisor, and consequently he may enforce the promise as if it were made directly to him.[1]

Thus, it will be seen that while the courts are united as to the effect of the assumption by the purchaser of a mortgage indebtedness upon the land conveyed, there exists some diversity of opinion as to the ground upon which the liability of the purchaser in such a case must rest. Under the former theory the mortgagee can enforce the promise only in equity, while in the latter the purchaser is brought into direct privity with the mortgagee, who may, if so inclined, bring an action at law upon the promise. Where the latter doctrine prevails, or where both are permitted, as is now generally the case, the mortgagee has a choice of remedies. He may proceed against the grantee personally to recover the amount of the mortgage debt without taking any previous steps against the original mortgagor or against the land, upon the theory that the grantee by receiving the fee of the land under an express promise to pay the mortgage debt thereby makes the debt his own;[2] or he may foreclose the mortgage and charge the grantee with any deficiency which may remain after applying the proceeds of the sale;[3] or the mortgagee may treat both the mortgagor and the vendee as principal debtors and have a personal decree against either or both.[4]

§ 6. **Contract of assumption.** To establish a promise on the part of a grantee to assume or pay off the mortgage no particular formal words are necessary; but, as in other cases of like character, any language which clearly tends to show the intention to impose the obligation will be sufficient.[5] There are cases which seem to intimate that where, from the terms of the deed, the question is doubtful, evidence may be received as to the value of the premises, the consideration actually paid

[1] Lawrence v. Fox, 20 N. Y. 268; Thorp v. Keokuk Coal Co. 48 N. Y. 253.

[2] Bently v. Vanderheyden, 35 N. Y. 680.

[3] Burr v. Beers, 24 N. Y. 178.

[4] Crawford v. Edwards, 33 Mich. 360.

[5] Belmont v. Coman, 22 N. Y. 438.

as compared with the agreed consideration, or as to whether the grantee retained any portion of the consideration for the purpose of discharging the debt;[1] but the better rule would seem to be that the contract of assumption cannot be established by inference or implication.[2]

The usual recital is that the grantee "assumes and agrees to pay" the mortgage, and generally "as part of the consideration;" but the fact that the deed fails to state that the assumption of the debt forms part of the consideration is immaterial so far as concerns the rights of the parties.[3] The words "assume and agree to pay" are always taken to create an obligation,[4] while it has been held that a deed made "subject to the payment" of an outstanding mortgage, or any equivalent expression which clearly imports an obligation intentionally created by the grantor and assumed by the grantee, will establish a personal liability on the part of the grantee for its payment.[5] Though the words "assume" and "pay" are usually employed in conjunction, and in this manner are certainly clearly indicative of intention, yet it is immaterial that the grantee does not agree "to pay" provided he "assumes" the debt. The legal import of the words are the same, and if the purchaser "assumes" the debt he makes it his own, and is legally bound to pay it.[6]

So, also, an agreement to pay the amount of a mortgage debt as a part of the consideration for the purchase is in effect an assumption of the mortgage, and the grantee will be liable to the holder of the lien for the amount due him,[7] the true and

[1] Winans v. Wilkie, 41 Mich. 264.

[2] Gage v. Jenkinson, 58 Mich. 169; Equitable Life Ass. Soc. v. Bostwick, 100 N. Y. 628.

[3] Locke v. Homer, 131 Mass. 93.

[4] Crawford v. Edwards, 33 Mich. 354; Huyler v. Atwood, 26 N. J. Eq. 504; Burr v. Beers, 24 N. Y. 178; Dunn v. Rogers, 43 Ill. 260; Schmucker v. Sibert, 18 Kan. 104; Lenning's Estate, 52 Pa. St. 138.

[5] Carley v. Fox, 38 Mich. 387; Locke v. Homer, 131 Mass. 93; Hoy v. Bramhall, 19 N. J. Eq. 563; Bowen v. Beck, 94 N. Y. 86. In Pennsylvania the words "subject to the payment" are declared by statute not to create personal liability.

[6] Locke v. Homer, 131 Mass. 109; Sparkman v. Gove, 44 N. J. Eq. 252; Bowen v. Beck, 94 N. Y. 86; Schley v. Fryer, 100 N. Y. 71.

[7] Smith v. Truslow, 84 N. Y. 660; Thayer v. Torrey, 37 N. J. L. 339; Kennedy v. Brown, 61 Ala. 296. And this, too, notwithstanding the mortgage may have been rendered void by an alteration. Daub v. Englebach, 109 Ill. 267.

manifest intent of such an act being to leave a part of the purchase money in the hands of the grantee for the purpose of discharging the mortgage; and this, it is held, raises an implied promise on the part of the grantee to pay the mortgage at maturity or within a reasonable time if it is then due.[1] It must be understood, however, that the foregoing result flows only from the expressed agreement, and that the mere deduction of the amount of a mortgage from the purchase price on the sale of lands does not, in the absence of an agreement to pay, absolutely impose upon the grantee the duty of paying or suffering his land to be taken in payment of the mortgage. While it is evidence of the grantor's intention to subject the land to such payment, it is not controlling or conclusive.[2] The authorities do not furnish any guide that is entirely satisfactory in the solution of this question; but unless the deed contains something more than a mere statement that the conveyance is made subject to existing incumbrances which have been estimated as a part of the purchase money and the amount of the debt deducted therefrom, no more can in reason be presumed than that the land is to be a primary fund for the payment of the mortgage without any other liability on the part of the grantee. In this, as in all other cases of contract, the inquiry is: What was the intention of the parties? And in seeking for that intention it must always be kept in mind that there is no rule of law which imposes a liability of this character unless the parties have declared it in words appropriate or sufficient to express that meaning.[3]

§ 7. **Proof of assumption — Acceptance of deed binds grantee.** As a deed takes effect only by delivery, and as this includes the concurrent acts of a profert on the one hand and an acceptance on the other, it follows that the mere fact of the execution and acknowledgment of a deed of land by a mortgagor, with a clause therein that the grantee should pay

[1] Heid v. Vreeland, 30 N. J. Eq. 591; Jewett v. Draper, 6 Allen (Mass.), 434; Braman v. Dowse, 12 Cush. (Mass.) 227; Urquhart v. Brayton, 12 R. I. 169.

[2] Thus, it may be inferred that the deduction was made to protect the grantee against a questionable incumbrance. Bennett v. Bates, 94 N. Y. 354; and see Remsen v. Beekman, 25 N. Y. 560; Lewis v. Day, 53 Iowa, 579.

[3] Belmont v. Coman, 22 N. Y. 438.

the mortgage indebtedness, and its being recorded, is not sufficient to create a personal liability on the part of the grantee to pay such indebtedness. To bind him it must appear that he assented to such clause; yet it is not necessary that he should sign the deed or execute any obligation, and by his acceptance of the deed his assent to all it contains may be inferred.[1] By such an act, freely and understandingly made, the grantee binds himself as effectually as though he had executed the deed himself as an indenture.[2]

The fact of recording is, however, quite generally accepted as an evidence of delivery and acceptance; yet this must be understood as applying to a deed simply conveying the premises, and not to a deed which imposes an obligation upon the grantee to pay a pre-existing incumbrance on the property.[3]

If there has been no delivery the grantee will not be bound by any stipulation of the deed;[4] nor if, where a deed has been made to him without his knowledge, he repudiates the same as soon as he becomes aware of its existence.[5]

§ 8. **Assumption by parol.** It would seem at first blush that unless parties have expressly stipulated in their deed for the assumption of a mortgage debt that no obligation could be created by evidence extrinsic thereto, upon the principle that the written contract is presumed to contain the entire undertaking, and that all prior negotiations and treaties have been merged therein. Such, indeed, is the rule with respect to all matters which clearly form a part of the conveyance; and as to such matters the deed itself must be considered as the final expression of the parties, and parol evidence cannot be received to enlarge or restrict its operation or effect. But it would appear that an agreement of assumption is something independent of the conveyance, and partakes of the nature of those collateral undertakings which the law permits to rest in parol; that such an agreement is additional to but not contra-

[1] Thompson v. Dearborn, 107 Ill. 87; Belmont v. Coman, 22 N. Y. 438; Crawford v. Edwards, 33 Mich. 354; Schmucker v. Sibert, 18 Kan. 104; Locke v. Homer, 131 Mass. 93.

[2] Bowen v. Beck, 94 N. Y. 86; Crawfords v. Edwards, 33 Mich. 354; Huyler v. Atwood, 26 N. J. Eq. 504; Adam v. Smilie, 50 Vt. 1; Dean v. Walker, 107 Ill. 540.

[3] Thompson v. Dearborn, 107 Ill. 87; but see Lawrence v. Farley, 9 Abb. N. C. (N. Y.) 371.

[4] Culver v. Badger, 29 N. J. Eq. 74.

[5] Cordts v. Hargrave, 29 N. J. Eq. 446.

dictory of the deed, nor at variance with it, and that it is not of the character of those negotiations and treaties which become merged in the terms of the written instrument. Hence, it has been held that, as being wholly outside of the conveyance, an oral promise by a purchaser to assume and pay a mortgage debt or assume and pay a debt or other incumbrance is valid and effectual, and may be enforced in equity by either the grantor or incumbrancee.[1]

§ 9. **Assumption of entire debt by purchaser of part of mortgaged property.** An interesting phase of the subject under discussion is where upon the purchase of a portion of property covered by mortgage the vendee assumes and agrees to pay, as all or part of the purchase price, the entire indebtedness secured by the mortgage; as where there are two lots covered by mortgage, and the vendor sells one subject to such mortgage, the vendee assuming and agreeing to pay the mortgage debt, while the other is retained by the vendor or conveyed by him to a third person without mention of the mortgage. As already explained, after conveyance to the assuming vendee, he becomes the principal debtor to the mortgagee, while the vendor remains simply surety for him, and every one having notice of the relation between them is bound to respect it. The lot first conveyed would be primarily liable for the payment of the mortgage debt, the other simply remaining as security, and the vendee, as the principal debtor, would be bound to protect his vendor and his land from any liability on account of such debt. This obligation on the part of the purchaser would not be affected by the conveyance of the remaining lot, and if he should fail to protect the same from sale under the mortgage he would become liable to the grantee thereof for the damages thus caused to him. Nor would the grantee of the remaining lot be bound to take any steps in an action to foreclose the mortgage, for it is the duty of the prin-

[1] See Wilson v. King, 23 N. J. Eq. 150; Putney v. Farnham, 27 Wis. 187; Ream v. Jack, 44 Iowa, 325; Barker v. Bradley, 42 N. Y. 316; Schmucker v. Sibert, 18 Kan. 104. A promise made by a vendor at the time of the delivery by him of a deed of real estate contracted to be sold, that if the vendee will accept and pay the purchase money he will pay an assessment upon the premises when due, is valid and binding, and an action can be maintained thereon. Remington v. Palmer, 62 N. Y. 31.

cipal to appear therein and protect the interests of his surety; and if he fails so to do, and the latter is in consequence deprived of his land, the value thereof would be the fair measure of his damages. Should he appear, however, he might procure a sale of the lot first conveyed in discharge of the debt, and if that portion should not sell for enough, then he might pay whatever balance might be due upon the mortgage to save his land, and the sum thus paid would be the measure of his damages.[1]

§ 10. Effect of assumption where grantor is not liable. Thus far the authorities are harmonious and in the main united. A diversity of opinion has arisen, however, in cases where on the sale of mortgaged premises the grantee assumes and agrees to pay the mortgage debt, when at the time of making the deed the grantor was not himself personally liable, legally or equitably, for the payment thereof, and this diversity of opinion has resulted in a number of contradictory decisions. A number of well-considered cases have enunciated the doctrine that under such circumstances the grantee, notwithstanding the assumption, is not personally liable for the debt or for any deficiency that may appear upon foreclosure and sale; and the rule, it is contended, is not inconsistent with that class of cases in which it has been held that a promise to one for the benefit of a third party may avail to give an action directly to the latter against the promisor. Under these decisions it is held that, to give a third party who may derive a benefit from the performance of the promise an action, there must be (1) an intent by the promisee to secure some benefit to the third party; and (2) some privity between the two, the promisee and the party to be benefited, and some obligation or duty owing from the former to the latter which would give him a legal or equitable claim to the benefit of the promise, or an equivalent from him personally. That, while there need be no privity between the promisor and the party claiming the benefit of the undertaking, nor any necessity that the latter should be privy to the consideration of the promise, it nevertheless does not follow that a mere volunteer can avail himself of it. There must be a legal obligation or duty of the promisee to

[1] Wilcox v. Campbell, 106 N. Y. 325.

him so connecting him with the transaction as to be a substitute for any privity with the promisor, or the consideration of the promise, the obligation of the promisee furnishing an evidence of the intent of the latter to benefit him, and creating a privity by substitution with the promisor. Hence, it is contended, a mere stranger cannot intervene and claim by action the benefit of a contract between other parties. There must be either a new consideration, or some prior right or claim against one of the contracting parties by which he has a legal interest in the performance of the agreement.[1]

This doctrine and the cases which sustain it are predicated upon the principle that, where the grantor is liable for the mortgage indebtedness, and the deed under which he conveys contains an assumption clause, the grantee becomes the principal debtor by virtue of the agreement, and the grantor occupies the position of a mere surety for him as to the payment of the mortgage indebtedness.[2] Such being the relative situation of the parties, in equity the creditor, who is the mortgagee, is entitled to the benefit of all collateral obligations for the payment of the debt which a person standing in the situation of a surety for others has received for his indemnity to relieve him or his property from liability for such payment. If this principle be permitted to obtain to the exclusion of a view of other principles, or the assertion of inconsistent remedies, then the doctrine as above stated is undoubtedly correct; and if the grantor of the mortgaged premises was not himself liable for the mortgage indebtedness, his grantee would not be, for the reason that the relation of principal debtor and surety would not exist between them.

There is an opposing class of cases, however, in which this doctrine, or at least its practical application and effect, is denied. Under these cases a directly opposite result is obtained; and the grantee, under the circumstances just described, is held personally liable. It is contended that the liability of the grantee may be placed on the broad and well-settled principle that where one person makes a promise to another, based upon

[1] Vroman v. Turner, 69 N. Y. 280; Norwood v. De Hart, 30 N. J. Eq. 414.
Trotter v. Hughes, 12 N. Y. 74; King v. Whitely, 10 Paige (N. Y.), 465; Hoy v. Bramhall, 19 N. J. Eq. 570;

[2] See cases cited in preceding paragraph.

a valid consideration, for the benefit of a third person, such third person may maintain an action upon it. In theory, and usually in fact, a portion of the purchase price is left in the hands of the grantee who purchases mortgaged premises, and the assumption of the mortgage debt forms a part of the consideration whether so expressed or not. In consideration of the money so left in his hands the grantee agrees to apply it as directed. Upon this view, therefore, it is a matter of no consequence to the grantee whether his grantor was legally bound to pay the mortgage debt or not. The grantor, upon a sale of his property, has the right to make such a disposition of the purchase money as he may see proper and to direct to whom it shall be paid; and if the grantee agrees to make payment according to the directions of the grantor, he cannot set up as a defense that the grantor was not bound to pay. As an illustration of the principle, it is said, suppose the grantor directs that the purchase money be paid to some public charity, a church or a college, and the grantee agrees so to do, is there any reason why he might not be compelled to perform his contract? And would it be any concern of his to whom the purchase money should be paid? The learned courts to whom these questions have been submitted have decided in the negative; and further, that it makes no difference in principle whether the grantor reserves the purchase money to himself, donates it to a public charity, or applies it to the redemption of a mortgage resting on the land; and that the rule that it is not necessary in order to a recovery from the grantee that the grantor should be liable is sound in principle and one which will promote the ends of justice and compel the due enforcement of contracts.[1]

The matter may fairly be considered as one of the unsettled questions of American jurisprudence, and one which, in consequence of the diverse views as to its underlying principles, is likely long to remain such.

§ 11. Effect of extension to purchaser upon mortgagor's liability. Where land is purchased subject to mortgage the vendee usually purchases not only the equity of redemption but the whole estate, assuming the payment of the mortgage

[1] Dean v. Walker, 107 Ill. 540; Merriman v. Moore, 90 Pa. St. 79.

as part of the purchase money, and in such case an express agreement to that effect is usually incorporated in the deed. As between the parties, in such event, the general rule is that the purchaser becomes primarily liable for the debt, while the mortgagor assumes the position of a surety — the land, of course, remaining the primary fund for payment. Although the arrangement does not discharge the vendor from liability to the lien creditor, who is no party to it, yet as between the grantor and grantee who has thus assumed the debt the grantor is a mere surety.[1] The mortgagee may, however, by his dealings with the purchaser, recognize him as the principal and the grantor as only a surety towards himself; but as the grantor's relation to the debt is not changed by his conveyance so as to take away his right as debtor to pay the debt at any time after it becomes due, and upon such payment, either voluntarily or by compulsion, being entitled to be substituted to the mortgage security as it originally existed, so it follows that the mortgagee, after the conveyance by the grantor, cannot deal with the grantee to the prejudice of the grantor's right of subrogation without discharging him from liability for the debt, either wholly or in part. Hence, an extension of the time of payment of the mortgage debt by an agreement between the holder of the mortgage and the purchaser, without the concurrence of the mortgagor, discharges him from all liability upon it.[2]

The doctrine that an agreement with the principal debtor extending the time for the payment of the debt, without the consent of the surety, discharges the latter is established by numerous authorities, and has often been applied in cases where the creditor did not know, in the origin of the transaction, that one of the parties was surety; and also when, by an arrangement between two original joint and principal debtors, one of them assumed the entire debt and this was known to the creditor;[3] while the rule that a mortgagee is bound, in dealing with his security and bond, to observe the equitable

[1] Russell v. Pistor, 7 N. Y. 174; Snyders v. Summers, 1 Lea (Tenn.), 534.

[2] Calvo v. Davies, 73 N. Y. 211; George v. Andrews, 60 Md. 26 (1881).

[3] See Millerd v. Thorn, 56 N. Y. 402; Colgrove v. Tallman, 67 N. Y. 95.

rights of third persons, of which he has notice, has frequently been recognized.[1]

§ 12. Vendor's right to compel payment of mortgage. It does not seem that a vendor who is also a mortgagor, and who has disposed of the mortgage property under an agreement of assumption by his vendee, can compel his creditor to file a bill of foreclosure against the persons to whom the property has been conveyed, particularly when there is no good reason why the vendor himself does not pay the mortgage obligation according to his agreement and take an assignment of the mortgage and proceed against the land and the grantee thereof for his indemnity.[2] But a suit in equity may always be maintained by a surety to compel payment by a principal on a covenant of indemnity; and so, where the vendee of mortgaged premises has assumed the payment of the mortgage the mortgagor may proceed in equity to compel such vendee, to whom he stands in the situation of a mere surety, to discharge the debt for his protection.[3]

The principle upon which such jurisdiction is based is that which arises in those cases where there is a breach of a contract which is binding in law, but the remedy at law is inadequate, while the proceedings are the same as those employed by courts of equity to compel the specific performance of contracts. In consideration of the conveyance to him of the mortgaged property the vendee assumes the payment of the mortgage debt and agrees to relieve the vendor from his liability therefor, and at the same time he is placed in possession of the property from which, theoretically at least, the payment of the obligation is expected to be derived. While the vendor might, upon default of the vendee, pay the amount of the obligation and recover it back from the vendee in an action at law, he is under no equitable obligation to pursue such a course; and many times good equitable reasons may be found why he should not be required to adopt such a proceeding, as the raising of the requisite amount of money might be very difficult, if not impossible, without the aid of the property which was the inducement of his promise to make such pay-

[1] Tice v. Annin, 2 Johns. Ch. (N. Y.) 125; Halsey v. Reed, 9 Paige (N. Y.), 446.

[2] Marsh v. Pike, 10 Paige (N. Y.), 595.

[3] Woodruff v. Erie R'y Co. 93 N. Y. 609; Marshall v. Davis, 78 N. Y. 414.

ment. It would therefore be inequitable under such circumstances to throw upon the vendor the burden of carrying the mortgage obligation, while the party ultimately liable for its payment retains the property and unjustly repudiates the obligation by which it was acquired.

§ 13. Unauthorized introduction of assumption clause. A vendor who has agreed to accept a conveyance subject to existing incumbrance is bound to no more than his express agreement, which cannot be extended by implication. He may refuse to accept a deed wherein he is made to assume the mortgage debt,[1] when such assumption clause is in direct contravention of the express terms of his agreement; and if through inadvertence he should accept the same, supposing that the deed was in conformity to the prior agreement, he will be entitled to relief in equity by having the deed reformed to correspond to the contract.[2] In such case relief will be granted, not so much on the ground of mistake but rather because of a fraudulent imposition, as where one party has deliberately inserted in a deed a covenant tending to his own advantage and another's prejudice, and the latter, in ignorance that the instrument contains the covenant, accepts it as in fulfillment of a contract which requires no such stipulation.[3]

§ 14. Stipulation inserted through mistake. Where, through the mistake of the scrivener and against the intention of the parties, an agreement to assume and pay a mortgage on the land is inserted in the deed, on the discovery of the mistake the grantor may release the grantee from all liability under said agreement; and a court of equity will not enforce the agreement at the suit of one who, in ignorance of the agreement and before the execution of the release, purchased the notes secured by the mortgage, although the grantee after the deed of conveyance to him paid interest accruing on the notes.[4]

§ 15. Purchaser subject to mortgage cannot assert paramount title. It seems that a grantee of a mortgagor who has taken his conveyance subject to the mortgage cannot, under a claim of paramount title, retain possession of the premises

[1] Lewis v. Day, 53 Iowa, 575.
[2] Kilmer v. Smith, 77 N. Y. 226.
[3] Kilmer v. Smith, 77 N. Y. 226.
[4] Drury v. Hayden, 111 U. S. 223.

against the purchaser at the sale under foreclosure — he having taken possession under the mortgage and by virtue of such stipulation. Where the grantee obtains possession from the mortgagor under an agreement to hold in subordination to the mortgage previously created, his stipulation is in effect to accord to the mortgagee all the rights inherent in his estate; one of which is that upon condition broken he may enter and take possession of the property. In this respect, it is contended, the position of the grantee of the mortgagor is not dissimilar from that of a tenant relatively to his landlord. Their respective relationships are often assimilated in the discussion of the question whether the grantee of the mortgagor can put in controversy, while in possession of the property, the title by force of which he entered.[1] To suffer such grantee to retain possession despite the rights of the mortgagee which he covenanted to respect, would, it is held, be to sanction a palpable fraud; and whether such adverse title be good or worthless, it cannot bar the rights of the purchaser on foreclosure to the possession.[2]

§ 16. Purchaser cannot deny validity of mortgage. A purchaser who takes title subject to the lien of a prior mortgage cannot be heard to question the consideration of the same or deny its validity;[3] and when the mortgage was given by his grantor to secure part of the purchase money upon the premises purchased by him, said grantee, so long as he remains in quiet and peaceful possession of the same, cannot defend against the mortgage because of failure of title.[4] Notwithstand-

[1] See Bigelow Estop. 401, 413, for a review of cases on this point.

[2] Chadwick v. Island Beach Co. 12 Atl. Rep. 380. In this case defendant purchased mortgaged property under a stipulation to hold the premises "subject to the payments, conditions and agreements specified" in the mortgage.

[3] Ritter v. Phillips, 53 N. Y. 586; Johnson v. Thompson, 129 Mass. 398; Forgy v. Merriman, 14 Neb. 513, Green v. Turner, 38 Iowa, 112; Conover v. Hobart, 24 N. J. Eq. 120; Valentine v. Fish, 45 Ill. 468. And it seems that, as against such a grantee, an assignee of the mortgage can enforce it as a lien to the full amount expressed therein, although he purchased it with a full knowledge that but one-half of that sum was actually loaned thereon, and he himself paid to the mortgagee the like sum only as consideration for the assignment. Freeman v. Auld, 44 N. Y. 50.

[4] Parkinson v. Sherman, 74 N. Y. 88. The fact that said grantee is liable to, and that in an action to foreclose the mortgage a judgment is asked against him for, any defi-

ing that the mortgage may have been a cover for usury, the purchaser cannot set up such usury either as a defense to the foreclosure or as a ground for cancellation of the security.[1] This proceeds upon the principle that the defense of usury is personal to the mortgagor, and therefore cannot be set up by his grantee.[2]

The proposition that a purchaser cannot deny the validity of a prior mortgage finds its strongest support in cases where the property has not only been conveyed subject to the mortgage, but where the grantee has assumed its payment as well, and in such cases has usually been strictly enforced. But where the grantee has been evicted by a paramount title, notwithstanding a covenant on his part to assume and pay an outstanding mortgage, the holder of the mortgage cannot enforce such covenant, as the substantial consideration therefor is the conveyance of a title, and upon eviction the consideration wholly fails.[3]

But the doctrine under discussion is not confined to cases where a contract of assumption exists; for where a vendor sells land expressly subject to a mortgage he thereby affirms it, and makes it obligatory upon the purchaser to recognize it as an existing lien.[4] This obligation he cannot evade or disavow, but takes the title *cum onere;* and although he is under no personal liability to pay the mortgage debt, yet he is not at liberty to

ciency, is immaterial; though it seems that in such case relief might be obtained by an equitable action in the nature of a bill of review, with all the parties in court, and a restoration of the premises. Id.

[1] Post v. Dart, 8 Paige (N. Y.), 639; Hackensack Co. v. De Kay, 39 N. J. Eq. 554; Hartly v. Harrison, 24 N. Y. 172.

[2] Cramer v. Lepper, 26 Ohio St. 62. Also upon the theory that the purchaser subject to mortgage acquires only the equity of redemption; that his only right is to redeem, and that if he will not avail himself of this right he cannot hold the land; and having no title in the land he cannot be permitted to avoid the mortgage by plea and proof of usury. Knickerbocker Ins. Co. v. Nelson, 78 N. Y. 150.

[3] The mortgagee who seeks to avail himself of such a covenant claims under and through the grantor, and his claim is subject to defenses arising out of the transaction between the original parties when the deed was executed. Dunning v. Leavitt, 85 N. Y. 30.

[4] Henderson v. Bellew, 45 Ill. 322; Green v. Kemp, 15 Mass. 515; Shufeldt v. Shufeldt, 9 Paige (N. Y.), 145; Reading v. Weston, 7 Conn. 413; Colgrove v. Tallman, 67 N. Y. 98; Miller v. Thompson, 34 Mich. 10; Fuller v. Hunt, 48 Iowa, 163.

contest the existence or validity of the mortgage, or the sum which it is nominally made to secure.[1]

It would seem, however, that the doctrine that a purchaser subject to a mortgage cannot contest it or deny its validity as a lien applies only when the mortgage is specifically described and identified. Hence, the acceptance of a deed for land "subject to the lien of all mortgages thereon," or which contains expressions of equivalent meaning, is not an admission of the validity and lien of all outstanding incumbrances; nor does such an act even admit that there are any such liens. If they exist the title is subject to them, but their existence and validity is not thereby conceded; and the vendee under such a deed is not estopped from contesting the validity of an alleged mortgage, and may show that what purports to be is not in fact an incumbrance subject to which he purchased. The vendee in such case does not buy subject to all apparent and pretended and invalid mortgages that may be set up, but subject only to such mortgages as are a lien, and so actual and real and valid.[2]

§ 17. Continued — When purchaser may set up defenses — Usury. There can be no dispute with respect to the proposition that the defense of usury can only be set up by a party to the usurious contract, or one who represents him, as a privy in blood or estate. In other words, that the defense of usury is a personal privilege; the party himself may plead it, but not a stranger.[3] So it has frequently been held that a subsequent

[1] It is sometimes asserted as a rule that the mortgagee can enforce the mortgage for no more than is justly and actually due between the mortgagor and the mortgagee; but this rule had its origin before the practice of giving mortgages to secure the payment of promissory notes was known, and was adopted on the ground that the bond accompanying the mortgage could be enforced in a court of law for the amount due only, and that the assignee should be placed in no better position in equity than at law. The rule has no application where the debt is secured by a negotiable promissory note, as the reason thereof does not then exist. See Dunning v. Leavitt, 85 N. Y. 30; Russell v. Dudley, 3 Conn. 147; Green v. Kemp, 15 Mass. 515.

[2] Purdy v. Cooper, 109 N. Y. 448. The fact that the vendee had notice of the mortgage when he purchased is immaterial, as it may well be presumed that he knew it was not a valid mortgage, and hence declined to buy subject to it in specific terms, while at the same time he was quite willing to take title subject to mortgages that were in truth a lien on the property. Id.

[3] Williams v. Tilt, 36 N. Y. 326; Bullard v. Raynor, 30 N. Y. 197; De

mortgagee or incumbrancee cannot defeat a prior incumbrance, or procure it to be set aside or canceled upon the ground that it is usurious; and the same rule has been held to apply to a vendee who purchases land subject to the lien of a usurious mortgage.[1] It is contended that the vendor has a right to say that the land shall first be appropriated to the payment of the usurious mortgage, and that his grantee cannot object to this appropriation or defend against the mortgage. But this is upon the theory that the vendee takes only an equity of redemption; that he buys subject to the lien, and if he does not see fit to avail himself of his right to redeem he cannot hold the land. In this view of the matter the rule is undoubtedly correct. If, however, the grantee has purchased the whole estate — that is, if he is a purchaser of the mortgaged premises generally, and not merely of the equity of redemption — it seems the rule does not hold. The vendee in such case is not a stranger; he claims under the mortgagor and in privity with him,[2] and may properly interpose any defense which goes to and affects the validity of the mortgage.[3] Thus, if a vendee purchases from a mortgagor without any deduction from the price on account of the incumbrance, he thereby becomes invested with the right to avail himself of the same defenses as might have been made by the mortgagor; and the conveyance, in such case, would amount to an authority to the purchaser to interpose the defense of usury.[4]

§ 18. Continued — Removal of purchaser's disability by acts of grantor. There is another interesting phase of the subject under discussion, which has received considerable attention from the courts in recent years, and from which it would seem that where a conveyance of land is made subject to the payment of a mortgage thereon, but without an express covenant on the part of the grantee to pay, the disability thus imposed upon him, which prevents him from disputing the validity of the mortgage, may be removed by the grantor by

Wolf v. Johnston, 10 Wheat. (U. S.) 367.

[1] Ritter v. Phillips, 53 N. Y. 586; Cramer v. Lepper, 26 Ohio St. 62; Maher v. Lanfrom, 86 Ill. 513.

[2] Lilienthal v. Champion, 58 Ga. 162.

[3] Maher v. Lanfrom, 86 Ill. 513.

[4] Maher v. Lanfrom, 86 Ill. 513; Post v. Dart, 8 Paige (N. Y.), 396; Greene v. Tyler, 39 Pa. St. 361; Newman v. Kirshaw, 10 Wis. 333.

conferring upon the former the right to question the mortgage which the original conveyance withheld.[1]

Where the deed of conveyance is made with a condition requiring the grantee to assume and pay the mortgage debt it is generally conceded that it is not within the power of the grantor by subsequent conveyance or agreement to release the grantee from his obligation without the consent of the mortgagee; but this doctrine, it is held, has not been extended to conveyances subject to a mortgage unaccompanied by covenants for its payment. Without denying the efficacy of the rule that, where a grantee takes a conveyance of land subject to the payment of a mortgage existing thereon, although he comes under no personal liability to pay the same, he is yet not at liberty to contest the existence or validity of such mortgage, it is nevertheless contended that this proposition proceeds upon the theory that under such a conveyance the grantee therein takes only an equity of redemption in the premises, and therefore holds no such title as enables him to secure more than the interest which was intended to be conveyed to him.[2] That he is not the privy either in contract or estate of his grantor. By receiving the absolute title and interest, however, the grantee becomes the privy in estate of his grantor, and hence takes the property subject to the same conditions and entitled to the same rights as pertained to it in his hands. Where, therefore, a grantee obtains title to premises under a conveyance making them subject to a mortgage, he labors under a disability imposed upon him by his grantor, who has intentionally retained to himself the privity which enables a party to dispute the validity of an apparent lien upon the premises granted. But this disability the grantor may remove by afterward conferring the right, which by his prior conveyance he simply withheld, upon the principle that where a grantor conveys a limited right in his property while possessing the power of conveying a greater interest, it follows that such interest as is not thereby conveyed still remains in the grantor, and is capable of being subsequently transferred by him through a conveyance vesting his grantor with title, and

[1] Bennet v. Bates, 94 N. Y. 354.

[2] See Knickerbocker Ins. Co. v. Nelson, 78 N. Y. 150.

that in this manner he may be discharged of the obligation to pay an invalid incumbrance.[1]

§ 19. Stipulation making whole debt due on default of partial payment. The stipulation usually inserted in mortgages, providing that the whole debt secured thereby shall become due and payable upon failure to pay any instalment of principal or interest, is a legal and valid stipulation, and is not in the nature of a penalty or forfeiture.[2] Assignees and purchasers of the equity of redemption take the land subject to this stipulation as much as any of the covenants inserted in the mortgage, and it may be enforced against the land in their hands in the same manner and to the same extent as if the assignment had not been made.[3]

§ 20. Effect of release of portion of mortgaged land. As between the original parties to a mortgage the release of any part or portion of the mortgaged land is immaterial, as every part of the tract is held to satisfy the mortgagee's demands. But as between the parties and third persons whose rights have intervened subsequent to the execution of the mortgage the question is one of moment. If the mortgagee, with knowledge that the mortgagor has sold and transferred a portion of the property, releases all or a part of the land retained by the mortgagor, he thereby discharges the part previously aliened to the extent of the *pro rata* value of the portion released;[4] and the same rule would apply to purchasers under the mortgagor, upon the principle that the mortgagee cannot by any act of his deprive the purchasers of the land of their right of contribution against each other.[5] In other words, if the mortgagee releases from his mortgage that portion of the premises primarily liable, he thereby releases *pro tanto* the portion

[1] See Bennet v. Bates, 94 N. Y. 354; Cope v. Wheeler, 41 N. Y. 311.

[2] Mobray v. Leckie, 42 Md. 476.

[3] Schooley v. Romain, 31 Md. 574.

[4] Taylor v. Short's Adm'r, 27 Iowa, 361; Deuster v. McCamus, 14 Wis. 337; Hall v. Edwards, 43 Mich. 473; Johnson v. Rice, 8 Me. 157; Paxton v. Harrier, 11 Pa. St. 312; Birnie v. Main, 29 Ark. 591.

[5] Where six separate lots or parcels of land were mortgaged, and the mortgagee afterwards released four of the lots from the mortgage, leaving the original debt to stand charged on the remaining two, it was *held* that the two lots were chargeable with their ratable proportion only of the original debt and interest, according to the relative value of the six lots at the date of the mortgage. Stevens v. Cooper, 1 Johns. Ch. 425.

secondarily liable; and when the mortgage is sought to be enforced against the owner of the latter, he can claim an abatement of his liability to the extent of the value of the portion which should have been made the primary fund.

The record of a subsequent deed, however, is not notice to the prior mortgagee, nor is he required to search the records from time to time to see what further dispositions have been made of the land; therefore any one interested in the equity as purchaser, wishing to protect himself, must bring home to the mortgagee actual notice of his equities. Hence, when part of the mortgaged premises have been released without notice of the rights of a subsequent purchaser, the latter cannot complain of the enforcement of the mortgage.

§ 21. **Vendor's right of subrogation.** It is a rule of equity that where the owner of land gives a note, bond or other obligation secured by a mortgage upon the land, and afterwards sells the property thus incumbered to a third person who agrees to pay such obligation, and thereafter the mortgagor is compelled to pay the mortgage debt to the lien creditor, such mortgagor is entitled, upon the doctrine of equitable subrogation, to be substituted in the place of the mortgagee as to the lien of the latter upon the mortgaged premises for the payment of the debt.[1] This is upon the principle that a surety is entitled to every remedy which the creditor has against the principal debtor whenever there has been a performance by him of his contract, and he has the right in such event to have the same advantages which the creditor could have claimed,[2] including the right to an assignment by the creditor.[3]

§ 22. **Presumption of payment.** As a general rule, where no satisfaction of a mortgage appears of record, the law will presume a payment of the debt it was given to secure, where the mortgagee has failed to exercise his right of foreclosure for the period of twenty years,[4] and the mortgage will cease to be a lien after the expiration of that period.[5] The presump-

[1] Marsh v. Pike, 10 Paige (N. Y.), 595; Josselyn v. Edwards, 57 Ind. 218.

[2] See Rice v. Rice, 108 Ill. 204; Talbot v. Wilkins, 31 Ark. 423.

[3] Eno v. Crooke, 10 N. Y. 66.

[4] Goodwin v. Baldwin, 59 Ala. 127; Lawrence v. Ball, 14 N. Y. 477; Emory v. Keighan, 88 Ill. 482.

[5] Blackwell v. Barnet, 52 Tex. 326; Whitney v. French, 25 Vt. 663; Locke v. Caldwell, 91 Ill. 417; Pollock v. Maison, 41 Ill. 516.

tion is disputable, however,[1] and may be rebutted by proof which is satisfactory that the debt has not been paid, such as the proof of payment of interest within twenty years, and continued absence from the country of the obligee, or other strong circumstances showing non-payment, or showing good cause for longer forbearance.[2]

§ 23. Continued — Admission of lien and promise to discharge same. While mere lapse of time will, if sufficiently continued, raise a presumption of payment and the consequent discharge of a mortgage lien, yet such presumption may be rebutted by the circumstances of the case, and notwithstanding such lapse, if less than the entire statutory period of limitation, the lien may be effectual to sustain a foreclosure. Thus, where the purchaser of mortgaged premises has recognized and admitted the existence of the lien within twenty years, and promised to discharge the mortgage, this has been held sufficient to rebut the presumption of payment arising from lapse of time.[3]

§ 24. Order of sale of mortgaged property. The general rule for the sale of mortgaged property on foreclosure is that the mortgagee shall first sell such parts of the mortgaged property as the mortgagor still retains, and then the parts which have been sold by him, in the inverse order of alienation;[4] and the same rule applies to successive mortgages of parts of mortgaged premises.[5] The justice of first subjecting to the payment of the mortgage so much of the mortgaged property as may still remain in the hands of the mortgagor cannot be denied; while the equity that a man's own property should first be applied to the payment of his own debts is ap-

[1] Cheever v. Perley, 11 Allen (Mass.), 588.

[2] Hale v. Pack, 10 W. Va. 152.

[3] And it seems such admissions of the purchaser are also legal evidence against all his judgment creditors whose judgments have been recovered subsequent to such admissions. Park v. Peck, 1 Paige (N. Y.), 477.

[4] Barnes v. Mott, 64 N. Y. 402; Worth v. Hill, 14 Wis. 559; Miller v. Rogers, 49 Tex. 398; Hiles v. Coult, 30 N. J. Eq. 40; Niles v. Harmon, 80 Ill. 396; Iglehart v. Wesson, 42 Ill. 261; McCullum v. Turpie, 32 Ind. 146; Holden v. Pike, 24 Me. 427; Sager v. Tupper, 35 Mich. 134; Root v. Collins, 34 Vt. 173; Lyman v. Lyman, 32 Vt. 79; Hinkle v. Alslatt, 4 Gratt. (Va.) 284. And see Allen v. Clark, 17 Pick. (Mass.) 47.

[5] Bernhardt v. Lymbruner, 85 N. Y. 172; Dodds v. Snyder, 44 Ill. 53.

parent without demonstration. And when a court of chancery requires a mortgagee first to exhaust that part of the mortgaged property still held by the mortgagor, it is only another application of the principle so long and firmly settled, that, where there are two creditors standing in equal equity, one of whom has security upon two funds, and the other only upon one of the two, the former is required to proceed primarily against the fund upon which the latter has no claim. Hence, where a mortgagor sells a part of the mortgaged premises by a conveyance which purports to transfer the fee, and retains a part himself, it is equitable as between him and his grantee that the part still held by him shall be first subjected to the payment of the debt, and this equity having attached to the land a subsequent purchaser from the mortgagor with notice takes it subject to the same equity.[1]

Such is the rule generally recognized and adopted, although it would seem that in a very few states it has been distinctly repudiated, and a rule has been adopted providing that the different grantees shall contribute proportionately to the discharge of incumbrances without regard to the order of alienation.[2]

It has been held, however, that the rule as first stated does not apply where it will work manifest injustice, and should, in obedience to equitable principles, be varied by circumstances;[3] nor is the rule ever applied when the parties by an agreement in their deed have charged a mortgage upon land, as when, by the terms of the sale of a part of the premises, the mortgage is made a common charge, or that part is conveyed subject to a proportionate part of the incumbrance. In such case if there be no specific agreement as to the proportion which each part is to bear, contribution must be made according to the relative value of each part.[4] It would also seem that in such cases the purchaser has no equity, as against the mortgagor, that the

[1] Iglehart v. Wesson, 42 Ill. 261; Briscoe v. Power, 47 Ill. 447.

[2] See Massie v. Wilson, 16 Iowa, 390; Barney v. Meyers, 28 Iowa, 472; Dickey v. Thompson, 8 B. Mon. (Ky.) 312; Morrison v. Beckwith, 4 T. B. Mon. (Ky.) 73.

[3] Hill v. McCarter, 27 N. J. Eq. 41; Worth v. Hill, 14 Wis. 559; Guion v. Knapp, 6 Paige (N. Y.), 35.

[4] Halsey v. Reed, 9 Paige (N. Y.), 445; Pancoast v. Duval, 26 N. J. Eq. 445.

portion still held by the latter shall be first applied to the payment of the incumbrance, and, having no equity against him, of course has none against his grantee.[1] So, too, the rule is reversed in cases where the grantee of a mortgagor assumes the mortgage in whole or in part, upon the principle that the grantee thus becomes the principal debtor, the mortgagor, and the parcels remaining simply as surety for the performance of the grantee's obligations;[2] and generally, the rule may be controlled by other equitable principles where the facts render such other principles applicable.[3]

The rule as first stated is not confined to mortgage liens, but is applicable generally to all liens which operate in a similar manner; hence a judgment creditor will not be permitted to enforce his judgment against the land of a subsequent purchaser so long as there are other lands of the debtor sufficient to satisfy the judgment. Where there are successive purchasers there is no contribution, and their lands are chargeable with the judgment against the debtor in the inverse order of alienation — that is, the lands last sold are to be first charged.[4] In such cases, while the equities between the several purchasers are equal, yet the first purchaser having the prior equity is preferred.[5] The priority of equity, however, is not determined

[1] Briscoe v. Power, 47 Ill. 447.

[2] Pancoast v. Duval, 26 N. J. Eq. 445; Wilcox v. Campbell, 106 N. Y. 325.

[3] As where a tract of land was mortgaged to A., and a part of it, subsequently, with other lands, was mortgaged to B., and the remainder afterwards to C., and in a suit to foreclose A.'s mortgage it appeared that B.'s claim was amply secured by the lands in his mortgage, which were not included in A.'s mortgage, *held*, that equity required that so much of the first-named tract as was included in B.'s mortgage should be subject to sale prior to the remainder, which was mortgaged to C. Where the adequacy of the security which will thus remain to B. cannot be tested by an actual sale before the court is required to settle the conflicting claims of the parties, its adequacy may be determined by the testimony of witnesses; but the court should, in such a case, act only on clear proof of its entire adequacy. Worth v. Hill, 14 Wis. 559.

[4] James v. Hubbard, 1 Paige (N. Y.), 228; Sanford v. Hill, 46 Conn. 53; Lyman v. Lyman, 32 Vt. 79; Brown v. Simmons, 44 N. H. 475; Wallace v. Stevens, 64 Me. 225; Cooper v. Bigly, 13 Mich. 463.

[5] James v. Hubbard, 1 Paige (N. Y.), 228. Under the principle that where the equities are equal, and neither has the legal right, the maxim "prior in time is prior in law" prevails.

by the date of the conveyance, but by the contract for the purchase of the land and the payment for the same.[1]

But while variations and departures from the rule are permitted, its general effect and operation is as first stated, and no part of the parcel first conveyed will be sold under the mortgage or judgment until the residue remaining in the hands of the mortgagor or debtor has first been subjected to the payment of the mortgage or judgment debt. If these lands are of sufficient value to satisfy the debt those previously conveyed will be wholly discharged, and in no case can they be charged with any larger sum than the proportion of the debt that may remain unsatisfied when the value of the other lands has been applied and exhausted.[2] The rule, therefore, may be stated as follows: As between the mortgagor or judgment debtor and all the grantees, the parcel in his hands, if any, is primarily liable for the whole debt, and should be exhausted before having recourse to any of theirs; as between the grantees, their parcels are liable in the inverse order of their alienation, and any parcel chargeable first in order must be exhausted before recourse is had to the second.[3]

§ 25. Contribution among purchasers. As previously remarked, a mortgagee or judgment creditor cannot enforce his judgment against the land of a subsequent purchaser so long as there are other lands of the debtor sufficient to satisfy the judgment; and where there are successive purchasers there is no contribution, but their lands are chargeable with the judgment against the debtor in the inverse order of alienation. It frequently happens, however, that judgments and mortgages are liens upon the lands of several persons, where there is equality of equity, and where contribution would be just and proper; as in the case of several conveyances to different persons by the mortgagor or judgment debtor at the same time; or where the lands bound by the judgment are in the hands of

[1] James v. Hubbard, 1 Paige (N. Y.), 228. Thus, if it should turn out that a purchaser had contracted for the purchase of his land and actually paid for the same, he would be preferred in equity to a subsequent purchaser, although the conveyance of the latter might be prior in point of time.

[2] Relfe v. Bibb, 43 Ala. 520.

[3] Guion v. Knapp, 6 Paige (N. Y.), 35; Carpenter v. Koons, 20 Pa. St. 222; Hill v. McCarter, 27 N. J. Eq. 41; Jones v. Myrick, 8 Gratt. (Va.) 179.

the heirs at law of the debtor, or of different persons claiming under them. Again, a judgment creditor is not bound to decide at his peril upon the equitable rights of the owners of different portions of the land upon which he has a lien, and if the land of the purchaser who has a prior equity is first sold, he can compel the other purchasers to refund to him the amount they were benefited by such sale in the discharge of their own lands from the lien.[1]

Where land is charged with a burden, each part ought to bear no more than its due proportion of the charge, and equity will preserve this equality by compelling the owner of each part to a just contribution.[2] A mortgagee or judgment creditor cannot by any act of his deprive the co-debtors or owners of the land of their right of contribution against each other, and in dealing with the security are bound to observe the equitable rights of third parties of which they have notice.[3]

§ 26. **Purchaser's right to redeem.** Nearly all of the oppressive features which at one time characterized mortgages have been abolished by express enactments or the constructions of courts, and in no proper sense can the term now be said to imply a "dead pledge." Ample means are provided for redemption upon a just and equitable basis, and purchasers are exposed to but little risk where a contract for the sale of mortgaged property is understandingly entered into. The right of redemption is given not only to the mortgagor, but to every one having a substantial interest in the property;[4] and a purchaser, if entitled to the legal estate of the mortgagor, or an existing interest therein,[5] may avail himself of the same privileges to which the mortgagor might have re-

[1] James v. Hubbard, 1 Paige (N.Y.), 228.

[2] Stevens v. Cooper, 1 Johns. Ch. (N. Y.) 425; Lamb v. Mason, 50 Vt. 352. Compare Kimball v. Meyers, 21 Mich. 284.

[3] Stevens v. Cooper, 1 Johns. Ch. (N. Y.) 425; Calvo v. Davies, 73 N. Y. 216.

[4] Ballard v. Jones, 6 Humph. (Tenn.) 455; Moore v. Beasom, 44 N. H. 215; Lyon v. Robbins, 45 Conn. 513; Rice v. Nelson, 27 Iowa, 148; Smith v. Austin, 9 Mich. 465; Morse v. Smith, 83 Ill. 396.

[5] Rogers v. Meyers, 68 Ill. 92; Scott v. Henry, 13 Ark. 112; Grant v. Duane, 9 Johns. (N. Y.) 612; White v. Bond, 16 Mass. 400. The rule extends to purchasers at execution sale subject to mortgage. See Hammond v. Leavitt, 59 Iowa, 407; Wellington v. Gale, 13 Mass. 483.

sorted within the period allowed for redemption. No form of words in the instrument, where it is designed to be security for a loan of money, will prevent a court of equity from granting relief, nor will any lapse of time, short of the period of limitation fixed by law, affect the right of redemption.[1]

If the mortgagor convey the mortgaged estate to two or more, either in severalty or in common, either grantee may redeem by paying all the money due;[2] but if several are interested in an equity of redemption, none can be compelled to redeem; and if any one wishes so to do he must redeem the whole mortgage. though only interested in a part of the equity, or in the equity of a part of the mortgaged premises.[3] The party so discharging the mortgage, however, although he cannot compel the others to contribute, will be considered as assignee of the mortgage, and entitled to hold the whole estate mortgaged until he has been reimbursed what he has paid beyond his due proportion.[4]

Parties interested in the premises, who were not served with process, are not bound by a decree of foreclosure of a mortgage thereon, and may redeem from a sale thereunder the same as if no such decree had ever been made;[5] and where one holds a contract for lands and is in open, visible and exclusive possession of the same, this is constructive notice to others of his rights therein.[6]

§ 27. Continued — Costs on redemption. As a general rule, a party coming into court to redeem mortgaged premises pays costs to the defendant, although he obtains the relief prayed for. But if he applies to the mortgagee before filing his bill to be allowed to redeem, and the mortgagee refuses to permit him to do so, or improperly resists his claim to redeem,

[1] Knowlton v. Walker, 13 Wis. 264.

[2] Taylor v. Porter, 7 Mass. 355.

[3] Gibson v. Crehore, 5 Pick. (Mass.) 146.

[4] Brooks v. Howard, 8 Pick. (Mass.) 497.

[5] Green v. Dixon, 9 Wis. 532.

[6] Noyes v. Hall, 7 Otto (U. S.), 34. In this case the owner of a tract of land mortgaged same to secure a debt and subsequently contracted in writing to convey the land to another, who thereupon entered and remained in possession. The mortgage was foreclosed, and the vendee, not having been made a party, was not served with process. The bill was taken as confessed against the mortgagor and the property subsequently conveyed by the master to the purchaser at foreclosure sale. *Held*, that the vendee was entitled to redeem.

the mortgagee may be compelled to pay costs to the complainant.[1] So also where the bill shows that the defendant ought not to be charged personally or subjected to costs, as where he holds the premises in question as a mere trustee, the costs must be borne by the complainant.[2]

§ 28. Mortgage estate converted into money. It is a rule that liens which were liens upon the property follow the proceeds thereof, and are liens upon the proceeds to the same extent that they were upon the property itself. Hence, where mortgaged premises are converted into money the rights of the mortgagee remain unaltered, and he is entitled to the money as an equivalent for the land.[3] In such case equity will direct the application of the money according to the rights of the parties as they existed before the alteration of the estate.[4]

The principle under discussion finds an excellent illustration in the case of condemnation proceedings where the land in question is mortgaged, and under the application of the principle a mortgagee is entitled to be paid out of the money allowed the mortgagor as damages on the land condemned.[5]

§ 29. Mortgages given prior to investure of title. It has frequently been held that a purchaser is not required to search for mortgages upon the premises purchased made by his vendor further back than the time at which title is shown by the records to have been vested in such vendor;[6] and where such purchaser obtains the legal title to the land and pays for the same before he has actual notice of the existence of a prior equitable mortgage thereon, his legal title will prevail against the prior equity of the mortgagee.[7] So, also, where a mortgagor who, at the time of giving the mortgage, does not possess the legal title, but only the equitable right to a conveyance thereof, has previous to such time contracted to sell certain parts of the premises to persons who were then in possession

[1] Swartwout v. Burr, 1 Barb. (N. Y.) 499.

[2] Sutphen v. Fowler, 9 Paige (N. Y.), 280.

[3] Astor v. Miller, 2 Paige (N. Y.), 68; Platt v. Bright, 31 N. J. Eq. 86.

[4] Crane v. Elizabeth, 36 N. J. Eq. 341; Gimbel v. Stolte, 59 Ind. 453.

[5] See Astor v. Hoyt, 5 Wend. (N. Y.) 603; Matter of John and Cherry Streets, 19 Wend. (N. Y.) 659.

[6] Losey v. Simpson, 11 N. J. Eq. 246; Calder v. Chapman, 52 Pa. 359; Heffron v. Flanigan, 37 Mich. 278.

[7] Farmers' Loan Co. v. Maltby, 8 Paige (N. Y.), 360; Edwards v. McKernan, 55 Mich. 520.

under their contracts; and if such purchasers, after the mortgagor has obtained the legal title and after the recording of the mortgage, but without notice thereof, obtain from such mortgagor conveyances for their respective portions of the premises and pay part of the purchase money, they will be protected at least to the extent which they have paid before notice, and the mortgagee will only be permitted to enforce his lien against the lots of the purchasers to the extent of the unpaid purchase money.[1] In like manner, if the vendee pays all of the purchase money before he is notified of the existence of the lien he will hold the land free from its operation or effect.

§ 30. Estoppel of mortgagee. It is a familiar principle that where a party holds a mortgage or other claim against property which he fraudulently conceals from a purchaser, he is estopped thereafter to assert such claim against such purchaser who bought in good faith and for value.[2] Nor can the holder of a mortgage who has been guilty of a fraudulent concealment, which deprives him in equity of the right to enforce the lien of his mortgage as against the mortgaged premises in the hands of a purchaser from the mortgagor, by a subsequent assignment of the mortgage give to the assignee a right to enforce such lien.[3]

§ 31. Effect of unrecorded mortgage. The principal object of the registry acts is to protect those who may part with their money or property, securities or other valuable rights upon the faith of a conveyance of real estate under the supposition that they are getting a good title thereto, or a legal and specific lien thereon, whenever such conveyance is received without notice, or having had any reason to believe that there existed any previous conveyance which could defeat such title or lien.[4] Under these acts an unregistered incumbrance is wholly void and inoperative at law as against a subsequent grantee or incumbrancer; but equity, in accordance with the manifest spirit and intention of the statute, at an early day adopted the principle of considering the prior deed or incum-

[1] Farmers' Loan Co. v. Maltby, 8 Paige (N. Y.), 361; Union College v. Wheeler, 61 N. Y. 88.

[2] Storrs v. Barker, 6 Johns. Ch. (N. Y.) 166.

[3] L'Amoureux v. Vandenburgh, 7 Paige (N. Y.), 316.

[4] Dickerson v. Tillinghast, 4 Paige N. Y.), 215.

brance as an equitable title or lien, and applied to such cases the same principles which had previously been adopted by the courts of chancery in relation to other contests between the holder of an equitable title or lien and a subsequent grantee or mortgagee of the legal title. In accordance with those principles, if the subsequent purchaser had acted in good faith, as, if he had actually parted with his property on the credit of the estate, so as to give him an equitable claim without notice of the prior equity, and had also clothed that equitable claim with the legal title by taking a deed, the court would not divest him of that legal title in favor of the prior equity. On the other hand, if he had notice of the prior equity at any time before he parted with his property on the credit of the estate, and before he had united the subsequent equity with the legal title, he was not considered entitled to protection. The law in this respect has undergone but little change, and notwithstanding that the separate jurisdiction of equity has in a majority of the states been abolished, the principles have been suffered to remain.

The principle that, if a person has an equitable lien upon real estate, a subsequent purchaser who obtains a conveyance of the legal estate with notice of that equity cannot in conscience retain such legal title in opposition to the lien is too well established to require citation of authority, and the rule applies with all its force in cases of unregistered mortgages; but with respect to the character of the consideration paid by such subsequent purchaser, as affecting the fairness and good faith of the transaction, the authorities are not in full accord. A very large class of cases maintains the doctrine that to constitute a *bona fide* purchaser within the recording acts the party receiving the subsequent conveyance must not only have taken the same without notice of the prior unrecorded mortgage, but that he must have received it upon some new consideration or have relinquished some security for a pre-existing debt.[1] He must have paid for the property a "valuable consideration," and this, it is said, necessarily requires something of actual value, capable, in estimation of law, of pecuniary meas-

[1] Wood v. Chapin, 13 N. Y. 509; Wert v. Naylor, 93 Ind. 434; Hinds v. Pugh, 48 Miss. 276.

urement.[1] Hence, it is contended, a deed for which the only consideration is the payment of a previous debt is not within the protection of the statute. The person receiving the same is not regarded as a *bona fide* purchaser for value within the meaning of the act so as to give him a preference over a prior unregistered mortgage.[2]

With respect to the justness of the foregoing rule there is much room for doubt, and it has in some instances been denied as harsh, oppressive and inequitable. Where the subsequent purchaser merely takes the legal estate as a security for a previous debt, without giving up any security, or divesting himself of any right, or placing himself in a worse situation than he would have been if he had received notice of the prior equitable lien previous to his purchase, perhaps it would be right that he should not be permitted to retain the legal title he has thus obtained to the injury of another;[3] but it is difficult to perceive why the absolute payment and satisfaction of an antecedent debt is not a purchase for value, nor why a person who extinguishes a claim of this character should not be regarded as acting in legal good faith and entitled to all the protection usually accorded to a purchaser under such circumstances.

Where a purchaser has received notice of a prior equitable lien previous to his purchase, he will not be permitted to hold the legal title he has thus obtained to the exclusion of the lien.[4]

§ 32. Lands held under contract. Where a mortgage is executed by the vendor on lands which he has contracted to sell, and the mortgagee has actual or constructive notice of the contract, his rights will be subservient to those of the vendee, and the lien, if any exists, will not attach to the land itself but only to the proceeds or avails thereof. If the vendee is in possession of the land, or if the contract of sale has been duly recorded prior to the execution of the mortgage, the mort-

[1] Brown v. Welch, 18 Ill. 343; Palmer v. Williams, 24 Mich. 328; Lawrence v. Clark, 36 N. Y. 128; Aubuchon v. Bender, 44 Mo. 560.

[2] Pancoast v. Duval, 26 N. J. Eq. 449; Wood v. Chapin, 13 N. Y. 525.

[3] Johnston v. Graves, 27 Ark. 560; De Lancey v. Stearns, 66 N. Y. 162; Hinds v. Pugh, 48 Miss. 276; Lewis v. Anderson, 20 Ohio St. 286.

[4] Van Heusen v. Radcliff, 17 N. Y. 583.

gagee has constructive notice of his equitable rights and takes the land subject to his prior equity.[1] If the purchase money has been fully paid the mortgagee will have no claim either upon the land or the person of the vendee; but if a part of it remains unpaid he will have an equitable lien to the extent of the unpaid purchase money.[2]

§ 33. **Merger.** The doctrine of merger, simply stated, is that whenever a greater and a less estate unite in the same person, without any intermediate estate, the lesser is merged;[3] and where the legal and equitable estates meet and unite in the same person, without an intervening interest outstanding in a third person, the equitable is merged in the legal estate, the latter alone subsisting. Thus, a conveyance by the mortgagor to the mortgagee extinguishes the mortgage.[4] Later decisions have greatly modified this rule, and it is now held that where two estates meet as above described a merger does not necessarily follow, but will depend upon the intent and interest of the parties; and, where it becomes necessary to advance the ends of justice, the two estates will be kept separate.

The doctrine of merger as applied to mortgages grew out of legal relations that are not now generally recognized. Thus, the mortgagee was considered as holding the legal estate, and the mortgagor the mere equity — a doctrine which is now practically abrogated either by statute or judicial construction. The principle, however, remains, and the same results are permitted to follow even where the mortgagee is regarded as having but a mere equitable lien upon the land for the payment of his debt.

In equity a merger never takes place where the requirements

[1] Governeur v. Lynch, 2 Paige (N. Y.), 300.

[2] Governeur v. Lynch, 2 Paige (N. Y.), 300; Ten Eick v. Simpson, 1 Sandf. (N. Y.) 249.

[3] Jackson v. Roberts, 1 Wend. (N. Y.) 478; James v. Morey, 2 Cow. (N. Y.) 246.

[4] Jackson v. Devitt, 6 Cow. (N. Y.) 310. Where a mortgagor sells the mortgaged premises subject to the mortgage, and a third party, having purchased the mortgage, afterward through mesne conveyances obtains title to the land, he thereby becomes vested with the estates of both mortgagor and mortgagee; the owner of the mortgage having acquired the primary fund for its payment, which is of value equal to the mortgage, he thereby occupies the position of one who has effected a strict foreclosure, and the mortgage debt must be regarded as paid. Lilly v. Palmer, 51 Ill. 331.

of justice or the intentions of the parties demand that it should not,[1] and the rule may be said to be that where the legal ownership of the land and the absolute ownership of the incumbrance become vested in the same person the intention governs; if his interests require the incumbrance to be kept alive, his intention to do so will be inferred, but if his best interests are not opposed to a merger, it will take place according to his supposed intention.[2] Thus, where a purchaser of the equity of redemption in mortgaged premises which are subject to the incumbrance of two mortgages of different dates takes an assignment of the senior mortgage for the protection of his title, such mortgage will not be merged in the equity of redemption so as to give the owner of the junior mortgage a preference.[3] Nor will a deed from a mortgagor to a mortgagee, intended as additional security only, and not as a satisfaction of the mortgage, merge the mortgage in the greater estate, so as to give priority to another mortgage which is a second lien.[4] So, also, in the absence of a special agreement to that effect, the taking of a new mortgage from the same party and on the same property will not merge or extinguish a prior one.[5]

§ 34. Deed with contract to reconvey. Occasion has already been had to speak of the effect of a clause for reconveyance inserted in an absolute deed with respect to its efficiency as a contract of sale,[6] and the subject will not be further reconsidered except as it may seem a necessary incident to the general topic discussed in this chapter. The general rule is that the form of the contract is immaterial where its manifest purport is that of security only, and hence that equity will construe a deed made upon a negotiation for the loan of money to be a mortgage, whatever may be the form of the conveyance, if the person to whom the application for the loan is made agrees to receive back his money with interest, or a

[1] Huebsch v. Schnell, 81 Ill. 281; Christian v. Newberry, 61 Mo. 446; Sheldon v. Edwards, 35 N. Y. 285.

[2] Judd v. Seekins, 62 N. Y. 266; Payne v. Wilson, 74 N. Y. 354; Aiken v. R. R. Co. 37 Wis. 469; Morgan v. Hammet, 34 Wis. 512; Powell v. Smith, 30 Mich. 451; Waterloo Bank v. Elmore, 52 Iowa, 541.

[3] Millspaugh v. McBride, 7 Paige (N. Y.), 509; Payne v. Wilson, 74 N. Y. 354.

[4] Huebsch v. Schnell, 81 Ill. 281.

[5] Christian v. Newberry, 61 Mo. 446.

[6] See ch. IV, p. 144.

larger amount within a specified time, and to reconvey the property;[1] and even where there is no expressed condition for reconveyance, if the transfer is only intended as security for a debt or the payment of money, it is still a mortgage.[2]

The latter phase of the subject is immaterial, however, in this connection, as the rule is well settled that while a conveyance of this character may be inquired into and its true import established as between the parties thereto, yet where the mortgagee has disposed of the land to an innocent purchaser for value such purchaser will be protected.[3] Where a clause for reconveyance is inserted a different question is presented, and as the rule is equally well settled that a subsequent purchaser with notice takes no greater interest than his grantor possessed, the inquiry becomes pertinent. An agreement of this character is often denominated a "conditional sale." It may be simply such or it may be a mortgage as well. A mere reservation of a right to repurchase, or of a covenant to reconvey, does not of itself convert a deed absolute on its face into a mortgage; nor is there any positive rule that such a covenant shall be regarded, either at law or in equity, as a defeasance. The owner of the land may be willing to sell at the price agreed upon, and the purchaser may also be willing to give his vendor the right to repurchase upon specified terms. Such a contract is not opposed to public policy, nor is it in any sense illegal.[4] And where, in a case of this kind, there is no subsisting debt or continuous liability of the vendor for the payment of the money, the mere agreement to reconvey is not sufficient to convert such a conditional sale into a mortgage.[5]

§ 35. Absolute conveyance, when treated as a mortgage. A deed absolute upon its face may, in equity, be shown by parol or other extrinsic evidence to have been intended as a mortgage; and this character will usually be ascribed to it whenever such conveyance is made on account of a present loan or precedent debt, with a concurrent agreement in writ-

[1] Holmes v. Grant, 8 Paige (N. Y.), 213; Russell v. Southard, 12 How. (U. S.) 139.

[2] Parks v. Hale, 2 Pick. (Mass.) 206; Carr v. Carr, 52 N. Y. 251; Bank v. Sprigg, 10 Pet. (U. S.) 257.

[3] Grimstone v. Carter, 3 Paige (N. Y.), 421.

[4] Hanford v. Blessing, 80 Ill. 188; Henly v. Hotaling, 41 Cal. 22; Glover v. Payn, 19 Wend. (N. Y.) 518.

[5] Holmes v. Grant, 8 Paige (N. Y.), 213; Reading v. Weston, 7 Conn. 143.

ing or parol for a redemption at any future time upon payment of the debt.[1] An absolute conveyance with an agreement for repurchase, however, may receive the interpretation which the face of the writings express;[2] and it is only when it is apparent that the real transaction was a loan or forbearance of money that a court of equity will construe a deed to be a mortgage.

But while the doctrine is undisputed that a court of equity will treat a deed, absolute in form, as a mortgage when it is executed as security for a loan of money, and will give effect to the actual contract of the parties irrespective of the terms of the instrument,[3] yet the legal import of an absolute conveyance is that it carries the fee. Any apparent contradiction of the effect of the conveyance must arise from extrinsic facts; and probably, where the grantor still retained possession of the property, a vendee from the grantee of record would be bound to notice the same, and inquire as to why he retained the possession of property the record title of which was vested in another. It is, however, the settled policy of the law to give security to and confidence in titles to the landed estates of the country which appear of record to be unimpaired;[4] and subsequent purchasers for value, without notice, will be protected by the record. So, where one in possession of land, under a conveyance absolute on its face, sells the same, his grantee, without notice that his vendor's deed was but a mortgage, will hold the property free from any equity of redemption;[5] and even though a

[1] Holmes v. Grant, 8 Paige (N. Y.), 243; Klein v. McNamara, 54 Miss. 90; Shays v. Norton, 48 Ill. 100; Turner v. Kerr, 44 Mo. 429; Moore v. Wade, 8 Kan. 380; Kerr v. Agard, 24 Wis. 378. The rule that parol proof is admissible to show that a conveyance of real estate, absolute upon its face, was intended to be a mortgage or security merely, is recognized and applied for the reason that such evidence is received not to contradict an instrument of writing, but to prove an equity superior to it. Saunders v. Stewart, 7 Nev. 200; Wilcox v. Bates, 26 Wis. 465.

[2] See p. 352, *ante*.

[3] A conveyance of the legal title to secure the payment of money differs from a statutory mortgage in that the legal title passes to the grantee, the grantor reserving the right in equity to redeem. This right, however, may become barred by the statute of limitations; and when so barred that an action for affirmative relief cannot be maintained thereon, it cannot be interposed as a defense to an action by the grantee to recover possession of the property. Richards v. Crawford, 50 Iowa, 494.

[4] McVey v. McQuality, 97 Ill. 97.

[5] Jenkins v. Rosenburg, 105 Ill. 157.

court of equity afterwards decides that the conveyance was only a mortgage, and the mortgagor was entitled to his equity of redemption, the title to the property will not be disturbed, but judgment *in personam* will be given against the mortgagee for the amount equitably due by him to the mortgagor.[1]

§ 36. **Property subject to judgment.** In states where the rule prevails that a purchaser who takes expressly subject to an incumbrance as between himself and his vendor makes the debt his own, and by such an act constitutes an engagement on his part to indemnify the vendor against loss on account of the charge, a judgment may be regarded in the same light as a mortgage or other incumbrance of like nature. Hence, a grantee who takes a deed expressly subjecting the land to the payment of a judgment then subsisting against the grantor and forming a lien upon the land makes the debt his own, and by virtue of such express charge its assumption becomes a part of the purchase money. Buying subject to the judgment, he in effect purchases only what remains after satisfaction of the judgment; and the payment of the incumbrance will, it seems, create no equity against a purchase-money mortgage given to the grantor.[2]

A judgment creditor stands in many respects in the same position as a mortgagee or other lienholder of record. He cannot enforce his judgment against the land of a subsequent purchaser so long as there are other lands of the debtor sufficient to satisfy the judgment; and where it becomes necessary to resort to such lands the rule is that they shall be charged with the judgment lien in the inverse order of alienation, the lands last sold being first charged.[3] If the judgment creditor discharges from the lien of his judgment a part of the lands which ought to be first resorted to, the owner of other parts of the lands, who has a prior equity, will be entitled to a deduction from the judgment of the value of the land so discharged before his lands are resorted to for the satisfaction of such judgment.[4]

[1] Baugher v. Merryman, 32 Md. 186; Jackson v. McChesney, 7 Cow. (N. Y.) 360; Grimstone v. Carter, 3 Paige (N. Y.), 421.

[2] Buckley's Appeal, 48 Pa. St. 491.

[3] Lyman v. Lyman, 33 Vt. 79; Sanford v. Hill, 46 Conn. 53; James v. Hubbard, 1 Paige (N. Y.), 228; Brown v. Simons, 44 N. H. 475; Wikoff v. Davis, 4 N. J. Eq. 224.

[4] James v. Hubbard, 1 Paige (N. Y.), 228.

CHAPTER XXVII.

VENDOR'S LIEN.

ART. I. BY IMPLICATION.
a. *Where the Vendor Parts with Title.*
b. *Where the Vendor Retains Title.*
ART. II. BY CONTRACT.

ART. I. BY IMPLICATION.

a. *When the Vendor Parts with Title.*

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23. Proceedings for enforcement.
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25. Purchaser's defenses.
26. Rents and profits.
27. Concurrent remedies.
28. As affected by the statute of limitation.
29. Vendor's lien and mechanic's lien.
30. Vendee's lien.

§ 1. General principles. It is now among the best-settled principles of equity that upon every sale of real property on credit without collateral security a lien is raised thereon in favor of the vendor, as a security for the unpaid purchase money, unless it has been waived by the express agreement of the parties.[1] Thus far the authorities are united and harmoni-

[1] Bayley v. Greenleaf, 7 Wheat. (U. S.) 49; Lewis v. Hawkins, 23 Wall. (U. S.) 125; Baum v. Grigsby, 21 Cal. 175; Mosier v. Meek, 80 Ill. 79; Pitts v. Parker, 44 Miss. 247; Gilman v. Brown, 1 Mass. 212; Phillips v. Skinner, 6 Bush (Ky.), 662; Ransom v. Brown, 63 Tex. 188;

ous; and while the doctrine is not of universal recognition, yet where it is permitted to obtain, and this includes a majority of the states, the rule holds absolute. But aside from the general proposition last stated, it may well be doubted whether any subject connected with the American law of real property is involved in more serious dispute as to its character and operation or uncertainty in respect to the methods of its application.

The intangible character of the lien, so utterly unlike anything else in the law, and the wide discretion given to the courts in its administration, have been productive of many different and ofttimes wholly contradictory phases of development and rules of interpretation. Its very essence is still a matter of controversy, while its practical operation can scarcely be said to be the same in any two of the states where it is recognized. In the face of all this a timid text-writer hesitates to define that which, giving equal faith and credit to all the learned courts of last resort, appears to be indefinable. It may be said, however, that it is usually regarded as a natural equity, which arises and exists independently of contract,[1] and, unlike an ordinary lien, is not a specific, absolute charge upon the property, but rather a simple right to resort to the same upon failure of payment by the vendee.[2] It is wholly independent of possession, and, unless waived or relinquished by express agreement, or by conduct plainly inconsistent with an intention of retaining it, is always presumed to continue.[3]

§ 2. **Derivation of the lien.** A vendor's or grantor's lien is founded upon the equitable proposition that he who has gotten the estate of another ought not to retain it without paying the full consideration therefor, and seems to have had its origin in the civil law. Certain it is that no such privilege exists by the common law; and the remedy, as now administered, is purely and solely of equitable jurisdiction. It seems that by the

Schwarz v. Stein, 29 Md. 117; McDole v. Purdy, 23 Iowa, 277; Shall v. Biscoe, 18 Ark. 142.

[1] Wilson v. Lyon, 51 Ill. 166; Green v. Demoss, 10 Humph. (Tenn.) 374; Wellborn v. Williams, 9 Ga. 86; Gilman v. Brown, 1 Mason (C. Ct.), 221; Shall v. Biscoe, 18 Ark. 142.

[2] Williams v. Young, 17 Cal. 403; Keith v. Horner, 32 Ill. 524.

[3] Gilman v. Brown, 1 Mason (C. Ct.), 212; Campbell v. Baldwin, 2 Humph. (Tenn.) 248; Wilson v. Lyon, 51 Ill. 166; Dodge v. Evans, 43 Miss. 570; Bennett v. Shipley, 82 Mo. 448.

Roman law the vendor of property had a privilege or right of priority of payment, in the nature of a lien on the property for the price for which it was sold, not only against the vendee and his representatives, but against his creditors and subsequent purchasers as well; and it was the rule of that law that, although the sale passed the title of the thing sold, yet it implied a condition that the vendee should not be master of the same unless he had paid the price, or had otherwise satisfied the vendor in regard to it, or unless a personal credit was given to him without satisfaction. It is thought that this affords the basis upon which the present remedy was constructed, and that courts of equity, impressed with the justice of the rule, established what we call the vendor's lien.

But although the idea of the lien was thus derived from the civil law, it does not exist by virtue of that law, but is, in all its essential details, the creature of the courts of equity, and is of force only as it may be regarded by those courts.[1] It is not of universal observance,[2] and in some of the states is entirely unknown,[3] while in others it obtains but a very limited recognition.[4]

§ 3. **Nature and operation.** The implied lien of a vendor for the unpaid purchase money, though having many apparent analogies in the law, is nevertheless *sui generis*, and distinguished from all those things to which it may bear some resemblance. It is not based upon stipulation or contract; neither is it an equitable mortgage, although frequently classed as such; nor yet a resulting trust, notwithstanding it possesses many of its features. It appears to be founded upon the presumption that the vendor does not intend unconditionally to

[1] Richards v. Leaming, 27 Ill. 431; Baum v. Grigsby, 21 Cal. 175.

[2] The lien is recognized in New York, New Jersey, Maryland, Tennessee, Michigan, Missouri, Mississippi, Minnesota, Georgia, Alabama, Illinois, Ohio, Indiana, Kentucky, Iowa, Arkansas, California, Wisconsin, Florida, Texas, and in the federal courts.

[3] This seems to be the case in Oregon and South Carolina. It seems to have been acted upon in Virginia and Vermont and subsequently abolished; and it has been expressly rejected in Maine, Pennsylvania, North Carolina and Kansas as being opposed to the prevailing policy, which tends to make all matters as to title to real estates open to inspection and subject to be established by record evidence.

[4] It is undecided or doubtful in Massachusetts, New Hampshire, Connecticut and Delaware, and expressly qualified in Ohio and Kentucky.

part with his land without payment, and, being created by inference alone, it is in effect a mere equity raised and administered by the courts, by whom it will be enforced or denied even as between the parties, as the exigencies of each particular case may seem to demand.[1] In this respect it differs radically from a lien created by contract and reserved on the face of the conveyance. This latter is regarded as a specific lien, forming an original substantive charge upon the estate conveyed, and as affecting all persons who may subsequently come into possession of the property with notice, either actual or constructive, of its existence. Such lien is not in all respects equivalent to a mortgage, the relation of the purchaser being more analogous to that of a trustee by express contract; yet it differs widely from, and possesses far greater efficacy than, the vendor's lien properly so called.[2]

The equitable lien of a vendor, if not created, is at least perfected only by the decree of a competent court, and only after having been so found does it have any practical operation or effect. When established it extends to the entire estate and right of property in the land; yet it must further be observed that a decree establishing a vendor's lien does not operate as the lien of a general judgment, but in the limited manner appertaining to it.[3]

§ 4. **Effect and extent of the lien.** As a general proposition the lien of the vendor extends to and takes effect against the vendee, his heirs and privies in estate, and all others who claim by, through or under him with notice of the unpaid purchase money.[4] It takes precedence of and prevails against the claim for dower by the widow of the purchaser,[5] and

[1] Allen v. Loring, 34 Iowa, 499; Swan v. Benson, 31 Ark. 108; Boynton v. Champlin, 42 Ill. 57; Wellborn v. Williams, 9 Ga. 86.

[2] Lincoln v. Purcell, 2 Head (Tenn.), 143.

[3] Hockaday v. Lawther, 17 Mo. App. 636. One claiming a vendor's lien on property amply sufficient to satisfy the lien cannot attack his vendee's conveyance of other property. Christopher v. Christopher, 64 Md. 583.

[4] Graves v. Coutant, 31 N. J. Eq. 763; Wilson v. Lyon, 51 Ill. 166; Yetter v. Fitts, 113 Ind. 34.

[5] Ellicott v. Welch, 2 Bland (Md.), 243; Fisher v. Johnston, 5 Ind. 492; Lee v. James, 81 Ky. 443, decided in pursuance of a statute creating priority; Boyd v. Martin, 9 Heisk. (Tenn.) 382. It has been held, however, that although a vendor's lien for the purchase money is superior to the marital right of the vendee's wife in the land, yet, if the vendor

against a voluntary donee, either with or without notice.[1] It also prevails against assignees claiming by virtue of a general assignment under the bankrupt or insolvent laws as well as assignees under a general assignment for the benefit of creditors — such assignees, in both instances, possessing no other or greater equities than those possessed by the debtor.[2]

It will never be permitted, however, to override or take priority of the rights or equities of third persons which have in good faith attached in ignorance of such vendor's equity, and in this respect it is utterly unlike a mortgage or any other lien created by express contract, or even by statute;[3] and as the lien is from its very nature secret, unknown to the world, and often productive of harm, it will not be extended beyond the requirements of the settled principles of equity, and is not ordinarily encouraged by the courts.[4]

§ 5. Extends to subsequent purchasers with notice. It is a universally received doctrine that he who purchases a trust property with notice of the trust is bound by it; and the vendor's lien being impressed upon the land very much in the

recovers a personal judgment against the husband for the amount and sells the land on execution thereunder, he waives his lien, and if afterwards the vendee dies, his wife's marital rights can be asserted by her. Nutter v. Fouch, 86 Ind. 451.

[1] Upshaw v. Hargrave, 6 S. & M. (Miss.) 292; Parker v. Foy, 43 Miss. 260; Burch v. Carter, 44 Ala. 115; Dwenger v. Branigan, 95 Ind. 221; Swan v. Benson, 31 Ark. 728: Harshbarger v. Foreman, 81 Ill. 364.

[2] Brown v. Vanlier, 7 Humph. (Tenn.) 239. It is the prevailing doctrine that an assignee does not take the title to the property of an insolvent as an innocent purchaser without notice, free from latent equities, etc., but as a mere volunteer, standing in the shoes of the insolvent as respects the title, and having no greater right in that regard than the insolvent himself could assert. Bank v. Stone, 80 Ky. 109; Walker v. Miller, 11 Ala. 1067; Hardin v. Osborne, 94 Ill. 571. It would seem, however, that under the statutes of Iowa a vendor's lien existing only in parol is defeated by the purchaser's general assignment for the benefit of creditors. See Prouty v. Clark, 73 Iowa, 55. The same rule may prevail in other states, but upon what principle of law such statutes are founded it is difficult to perceive.

[3] Allen v. Loring, 34 Iowa, 499; Swan v. Benson, 31 Ark. 728; Moody v. Fislar, 55 Ind. 592; Moshier v. Meek, 80 Ill. 79.

[4] Cowl v. Varnum, 37 Ill. 181; Doolittle v. Jenkins, 55 Ill. 400. The policy of the law designs that the records should exhibit the true condition of the title to all real estate, and for this reason an equitable lien will never be enforced except in cases where the right is clearly and distinctly made out. Conover v. Warren, 1 Gilm. (Ill.) 498.

form of an implied trust, which exists in every case of sale where the money is not paid unless it be otherwise agreed upon by the parties, it necessarily follows that a subsequent purchaser with notice of the lien, or of the facts which create it, takes the estate subject to the prior equity of the original vendor; and this, too, notwithstanding that he may have paid therefor a valuable consideration.[1] Such purchaser, though holding the legal title, can derive no advantage therefrom as against the former owner until the lien has been satisfied or discharged, and will be held a trustee for the benefit of the party whose rights he has thus invaded and sought to defeat.[2] It would seem, however, that in case of the sale of a part of the premises by the vendee with notice, the vendor will be required to exhaust the property remaining in the vendee's hands before he can resort to the portion thus sold.[3] Where, however, the vendee sells all of the land to different purchasers, who are all in the same situation and have notice of the first vendor's rights, the lands must be charged ratably with the lien.[4] From the fact that second purchasers with notice of the existence of the lien have ample means to protect themselves from loss by retaining the purchase money or by abstaining from buying the land until it has been paid for by the vendee, the law will presume that they took it subject to the incumbrance.

It would also seem that while lands charged with a vendor's lien should bear the burden of the same ratably when it has passed into the hands of two or more subsequent purchasers, yet where a purchaser from the first vendee of a portion of the premises holds in such a manner that the first vendor's lien still exists as to him, and he purchased with knowledge that the residue of the premises had been sold to other parties discharged from that lien, the portion so purchased by him must

[1] Autrey v. Whitmore, 31 Tex. 627; Lincoln v. Purcell, 2 Head (Tenn.), 143; Webb v. Robinson, 14 Ga. 216; Hamilton v. Fowlkes, 16 Ark. 340; Pell v. McElroy, 36 Cal. 268; Manly v. Slason, 21 Vt. 271; Meigs v. Dimmock, 6 Conn. 458; Marsh v. Turner, 4 Mo. 253; Neil v. Kinney, 11 Ohio St. 58; Grapengether v. Fejewary, 9 Iowa, 163; Amory v. Reilly, 9 Ind. 490; Thorn v. Wilson, 27 Ind. 370; McLaurie v. Thomas, 39 Ill. 291.

[2] McLearn v. McLellan, 10 Pet. (U. S.) 152.

[3] McLaurie v. Thomas, 39 Ill. 291.

[4] Blight v. Banks, 6 T. B. Mon. (Ky.) 192.

bear the whole burden of the unpaid purchase money due the first vendor.[1]

§ 6. **Does not affect purchasers without notice.** But while equity is ever ready to extend its protecting arm in favor of a defrauded vendor, and to afford to him a remedy for the enforcement of his just claim, it is equally zealous in guarding the rights and equities of third persons who in good faith and in ignorance of the vendor's rights have acquired interests in the property. Hence the implied lien of a vendor is never permitted to exist against a *bona fide* purchaser without notice who pays for the land a valuable consideration.[2] The reason for this is obvious — the policy of the law designs that the records should exhibit the true condition of the title to all real estate; and where a purchaser, finding the record title and possession co-existing in the same person, purchases without notice of latent equities in favor of third persons, it is but just that he should be protected in his purchase and enjoy the estate which he has honestly and in good faith acquired.

§ 7. **What constitutes notice.** As a general rule, any circumstance that should put a prudent and reasonable man on inquiry will be sufficient to charge a subsequent purchaser.

[1] If, however, at the time such second purchaser, holding subject to the first vendor's lien, acquired his title, there remained another portion of the premises subject to that lien, these two portions being chargeable ratably with the entire lien, and the latter portion was afterwards sold to another party to whom the first vendor released his lien with notice of the sale to the former of these two purchasers, then the second purchaser, who still holds subject to the lien, will hold his portion discharged from the ratable proportion thereof which had existed upon the other portion at the time he purchased, and which had been released on the subsequent sale of the same. McLaurie Thomas, 39 Ill. 291.

[2] Lincoln v. Purcell, 2 Head (Tenn.), 143; Houston v. Stanton, 11 Ala. 412; Bradford v. Harper, 25 Ala. 337; Scott v. Orbinson, 21 Ark. 202; Collier v. Harkness, 26 Ga. 362; Work v. Brayton, 5 Ind. 396; Boon v. Barnes, 23 Miss. 136; Schwartz v. Stein, 29 Md. 112; Putnam v. Dobbins, 38 Ill. 394. But one who seeks to defend against a bill to foreclose a vendor's lien on the ground that he is a *bona fide* purchaser should, in addition to briefly pleading the contents of his deed, also show independent of its recitals the consideration, and that it was actually and in good faith paid. He should further positively deny notice before payment and delivery of the deed, whether it is charged or not, and if charged should deny all circumstances referred to from which it could be inferred. Pearce v. Foreman, 29 Ark. 563.

The fact that the original vendor remains in open possession of the property possesses great significance,[1] while if the purchaser has heard of unfinished negotiations or agreements in relation to the land between his vendor and the original vendor;[2] or if he knows that any portion of the purchase price is still unpaid;[3] or if by the recitals of the deeds under which he claims that fact is apparent,[4] he cannot plead the good faith of his purchase nor resist the enforcement of the lien. Where a deed shows upon its face that the property conveyed by it was sold upon credit, the record thereof has been held a sufficient notice to a subsequent purchaser to put him on inquiry as to the payment of the purchase money and the extinguishment of the vendor's lien;[5] and such recitals are ordinarily held to afford constructive notice of the vendor's equity, even though the deed does not purport to reserve a lien.[6] In such a case the law imposes the duty of inquiry, and wherever inquiry is a duty the party bound to make it is affected with knowledge of all which he would have discovered had he performed the duty. Means of knowledge with the duty of using them are, in equity, equivalent to knowledge itself.[7]

The evidence to charge a subsequent purchaser must, however, in every instance be clear and satisfactory. Loose, vague or uncertain testimony will not suffice. The fact of notice must be fully established, and the notice must be of such a character as to raise the duty of inquiry.[8]

§ 8. **Is not impaired by death.** Notwithstanding that the lien of the vendor is considered as personal and incapable of assignment, it does not abate or become extinguished by his death, but passes to his representatives, and even to his dev-

[1] Pell v. McElroy, 36 Cal. 268; Hamilton v. Fowlkes, 16 Ark. 340.

[2] Hopkins v. Garrard, 6 B. Mon. (Ky.) 66.

[3] Manly v. Slason, 21 Vt. 271; Baum v. Grigsby, 21 Cal. 176; Harshbarger v. Foreman, 81 Ill. 364.

[4] Woodward v. Woodward, 7 B. Mon. (Ky.) 116; McAlpine v. Burnett, 23 Tex. 649; Kilpatrick v. Kilpatrick, 23 Miss. 124; Melross v. Scott, 18 Ind. 250; Tydings v. Pitcher, 82 Mo. 379.

[5] Neel v. Pricket, 12 Tex. 137; Champion v. Brown, 6 Johns. Ch. (N. Y.) 398; Williamson v. Brown, 15 N. Y. 354; Cordova v. Hood, 17 Wall. (U. S.) 1.

[6] Keith v. Wolf, 5 Bush (Ky.), 646.

[7] Cordova v. Hood, 17 Wall. (U. S.) 1.

[8] Harshbarger v. Foreman, 81 Ill. 364.

isees, in the condition in which it existed at the time, and may by them be enforced against the land.[1] At first blush this would seem to constitute an apparent exception to the rules before stated that a vendor's lien is personal in its nature and incapable of assignment; but in fact it is not an exception at all, but the common attribute of nearly all personal rights except those springing from torts.[2]

Nor will the death of the grantee destroy the vendor's lien for the purchase money,[3] and the same may be enforced against his estate[4] or those into whose hands the property may come.

§ 9. **Effect as against creditors.** The question as to whether a vendor of land who has parted with the title may charge the land with the unpaid purchase money as against the creditors of the vendee is one which has not received a uniform answer from the courts of the country. A secret trust, which is at once the mantle and the indication of fraud, is not and should not be a favorite of the law; and though an equity may exist in behalf of the vendor against the land itself, yet, as has been well observed, "there can be no sound reason given why this equity should override all others, though founded in equal justice and originating, perhaps, in the very faith and credit which property in the land has imparted to the grantee."[5] Accordingly, it has been held that the vendor's lien cannot be allowed to prevail against creditors of the vendee who subsequently may have acquired a lien upon the estate, whether with or without notice, either by judgment or in any other mode, before a bill has been filed by the vendor to assert his lien. This has been asserted upon the principle that the equity, though it relates to the date of the conveyance, does not acquire the character or effect of a specific lien upon the property until the filing of a bill to enforce it. Hence, as between the vendor and subsequent lien creditors of the vendee, it becomes essentially a question of priority of liens irrespect-

[1] Lavender v. Abbott, 30 Ark. 172; Champion v. Brown, 6 Johns. Ch. (N. Y.) 403; Tierman v. Beam, 2 Ohio, 383; Keith v. Horner, 32 Ill. 534. The vendor's lien goes to the executor or administrator, not to the heir. Evans v. Enloe, 70 Wis. 345.

[2] Richards v. Leaming, 27 Ill. 431.

[3] Crowe v. Colbeth, 63 Wis. 643.

[4] In a suit to enforce a vendor's lien against the estate of a deceased vendee the personal property should first be applied before ordering a sale of the real estate. Sommerville v. Sommerville, 26 W. Va. 479.

[5] Fain v. Inman, 6 Heisk. (Tenn.) 5.

ive of notice and all other considerations.[1] Upon principles of natural justice no less than the settled policy of the law, both the reasoning and conclusions of the above-stated doctrine would seem correct; yet there are cases which, to some extent, militate against the doctrine, and in some instances contravene it. Thus, it has been held that the lien is superior to the right of a purchaser under a judgment sale who had notice of the vendor's lien at the time of purchase, although not at the time when the judgment lien attached;[2] while in several instances it has been held that it will prevail against the judgment creditors of the vendee.[3]

The principle upon which these latter cases proceed is that the general lien of a judgment on lands does not *per se* constitute a right of property in the land itself, but only confers a right to levy on the same to the exclusion of other adverse interests subsequent to the judgment; and that while the judgment creditor takes in execution under his judgment all that belongs to his debtor, he can take nothing more — he stands in the place of his debtor when he purchases under his judgment, and takes the property of his debtor *cum onere*, subject to every liability under which the debtor himself held it; that the general lien of a judgment on property is subject to all the equities which exist at the time in favor of third persons, and that a court of equity will limit such lien to the actual interest of the judgment debtor in the property.[4] And Mr. Story,[5] in the assertion of the same principle, says that a vendor's lien will prevail against a judgment creditor of the vendee; "for each party, as a creditor, would have a lien on the estate sold with an equal equity, and in that case the maxim applies, *Qui prior est in tempore, potior est in jure.*"

§ 10. When enforced in favor of one not the grantor. A vendor's lien is often spoken of as a "grantor's" lien, the two terms being generally regarded as synonymous. It would

[1] Green v. Demoss, 10 Humph. (Tenn.) 376; Ellis v. Temple, 4 Coldw. (Tenn.) 315. And see Prouty v. Clark, 73 Iowa, 55.

[2] Senter v. Lambeth, 59 Tex. 259; and see Poe v. Paxton, 26 W. Va. 607.

[3] Jenkins v. Bodley, Smedes & M. Ch. (Miss.) 338; Walton v. Hargroves, 42 Miss. 18.

[4] See Walton v. Hargroves, 42 Miss. 18; Holloway v. Ellis, 25 Miss. 103; Tompkins v. Mitchell, 2 Rand. (Va.) 428; Patterson v. Johnson, 7 Ohio, 226.

[5] 2 Story, Eq. Jur. 596.

seem, however, that this is not strictly true; and questions have arisen which tend to show a difference, in theory at least, between a vendor and a grantor, and under which a lien has been raised for persons other than the grantor.

Thus, it is said, a grantor is one who gives, bestows or concedes a thing, and in legal parlance is understood to be one who executes a deed or conveyance, and may be distinguished from a vendor, who is a seller, or a person who disposes of a thing for money.[1] Without stopping to analyze this proposition, it is sufficient to say that it has found considerable support when used in connection with a vendor's lien, and that under it a lien has been permitted to be enforced in favor of one who was not the grantor of the land, and where the deed to the vendee was executed by a third person. Thus, where the owner of land has made a parol gift to a third person who afterwards sells to another,[2] or where one has purchased without taking a deed, and has subsequently sold to a third party,[3] and the original owner in both instances makes a deed to the vendee. Here the legal title never was in the vendors, yet they were the sellers without being the grantors, and their liens as such were recognized and established.[4]

This is only in conformity to the principle that regulates and governs courts of equity in the enforcement of vendors' liens; which is, that an implied agreement exists between the vendor and vendee that the former shall hold a lien on the lands sold for the payment of the purchase price, on the ground that a person who has the estate of another ought not, in conscience, as between them, keep it and not pay the purchase money. Usually the lien is given to the grantor in the deed, who is the vendor as well; but equity looks at the substance and not the form of things, and makes its decrees according as the right may appear. It is not necessary, therefore, that the legal title of record should have stood in the vendor; it is enough that he owned and controlled it and made the contract for its sale; and so, whenever the equitable owner of land —

[1] Russell v. Watt, 41 Miss. 602; Perkins v. Gibson, 53 Miss. 704.

[2] Russell v. Watt, 41 Miss. 602.

[3] Halloway v. Ellis, 25 Miss. 103.

[4] See Stewart v. Hutton, 3 J. J. Marsh. (Ky.) 178; Ligon v. Alexander, 7 J. J. Marsh. (Ky.) 289; Davis v. Pearson, 44 Miss. 511; Anderson v. Spencer, 51 Miss. 871; Loomis v. R. R. Co. 17 Fed. Rep. 301.

the legal title being in another — sells the same, and procures a conveyance from the holder of the legal title to be made to a third person, a court of equity will regard the equitable owner as the vendor, and he may enforce a vendor's lien for the unpaid purchase money against the land so conveyed.[1]

There is another phase of this subject which seems to have received a recognition in some localities, and which in its general aspect is opposed to some of the best-known rules which govern the relation of vendor and vendee. Thus, it is an established principle that the lien is personal to the grantor, yet it has been held that it may be available by others; and when the purchaser of land assumes as part or whole of the purchase money a debt which his vendor owes to a third person, and gives his promissory note payable to such third person by mutual agreement of all parties concerned, it has been held that the note continues to be a charge on the land as a vendor's lien for unpaid purchase money, and unless waived such lien may be enforced by the promisee by bill in equity for his own benefit.[2]

§ **11. Title made in name of third person.** It often happens that land is in fact purchased by one person although the conveyance, by his direction, is made to another. Where an oral negotiation is thus made by a purchaser of land, and by his request or permission the legal title is made to another person, the vendor's lien for the purchase money attaches without any special agreement for its retention, and follows the land in the hands of the grantee, who is bound by this

[1] Beal v. Harrington, 116 Ill. 113; Carey v. Boyles, 53 Wis. 574; Loomis v. R. R. Co. 17 Fed. Rep. 301. In this case A. bought of the owners land required by a railroad company for a right of way, and caused it to be conveyed to the company, A. paying for it himself, and taking from the company a draft for the amount, not as security, but as payment. The draft was not paid. *Held*, that A. had a vendor's lien upon the right of way.

[2] Woodall v. Kelly, 85 Ala. 386. In this case the vendor was indebted to A., who in turn owed K. & Co., the complainants in the bill. By mutual agreement of all parties in interest the note for the purchase money was made payable to K. & Co., in payment of the claim against A. and of A.'s claim against the vendor to the extent of the face of the debt. *Held*, that the lien was an incident of the debt due for purchase money, and might be enforced by K. & Co. And see Carver v. Eads, 65 Ala. 190; Mitchell v. Butt, 45 Ga. 162; Thompson v. Thompson, 3 Lea (Tenn.), 126; Mize v. Barnes, 78 Ky. 506.

special equity affecting it as a charge, of which he may have notice. The dealings between the purchaser and the grantee, whatever might be their effect as between themselves, would not affect the rights of the vendor;[1] nor would the fact that the purchaser may have given his personal obligation for the unpaid purchase money be construed as the taking of independent or collateral security.[2] It is true that if land is bought by one as the agent of another, and a conveyance is made to the principal, the real purchaser, and the vendor accepts the obligation of the agent for the unpaid purchase money, he will waive his lien as vendor; but this rule has no application to a case where the purchase is made by a party for himself, and the deed is made to another at his suggestion and for his convenience, or to one in trust for his use. In such case he is the real purchaser, and his obligation to pay for the same is not collateral security.[3]

§ 12. Recital of payment in deed. The formal clause inserted generally in deeds of conveyance reciting the consideration and admitting receipt of purchase money is always open to explanation, and, for all purposes except to defeat the operation of the instrument, to contradiction, if necessary to preserve the vendor from fraudulent imposition. Such a recital does not waive or destroy the vendor's lien, but is *prima facie* evidence of payment, which the vendor must explain or disprove in seeking to enforce his lien.[4] The statement of a particular consideration is *prima facie* evidence that such is the real consideration, and the burden is cast upon the vendor to show the contrary.[5] But to effect this slight evidence only is required, and when the fact of non-payment appears a lien may be declared notwithstanding the formal receipt for the consideration.[6]

§ 13. Money expended by the vendor for improvements. It would seem that under the elastic rules of equity a lien may lie in favor of the vendor, not only for the unpaid portion of

[1] Crampton v. Prince, 83 Ala. 246.
[2] Beal v. Harrington, 116 Ill. 113; Crampton v. Prince, 83 Ala. 246.
[3] Beal v. Harrington, 116 Ill. 113.
[4] Kelly v. Karsner, 2 South. Rep. (Ala.) 164; Tobey v. McAllister, 9 Wis. 462.
[5] Cuney v. Bell, 34 Tex. 177.
[6] Scott v. Orbison, 21 Ark. 202; Gordon v. Manning, 44 Miss. 756; Holman v. Patterson, 29 Ark. 357.

the purchase price as stipulated, but also for the value of annexations and improvements placed upon the land at the request of the vendee. The necessary cost of such improvements when paid for by the vendor is, in such a case, to be regarded as so much unpaid purchase money, for which the vendor may enforce a lien.[1] But where a vendor seeks to enforce a lien for the cost of improvements paid by him, which by the terms of sale the vendee was to pay, proof of the amount so paid, without any evidence as to the value of the improvements, is not sufficient when the proof made by the vendee is that the whole cost of making the improvements ought to have been much less than the amount paid by the vendor. Under such circumstances the vendor should not only show what he paid, but he should, it seems, make some proof in regard to the value of the improvements for which he paid.

§ 14. Only lies for a debt. As remarked in the opening paragraphs of this chapter, the essential character of the vendor's lien in equity is still a matter of uncertainty, notwithstanding the frequency with which it has been examined by the learned courts of both hemispheres. As the result of this uncertainty we find curious and irreconcilable rulings in its practical application. Thus, it will probably be generally conceded that the lien is based upon and created by a debt for unpaid purchase money. It is contended, however, by one line of decisions that this debt must be fixed in amount and due directly to the vendor,[2] and that it cannot be extended to cover collateral obligations or duties, or the performance of conditions. This, it is contended, is fundamental. As, if the vendee's obligation consists of a collateral covenant, or is for

[1] Grove v. Miles, 71 Ill. 376. In this case the parties entered into a written agreement, whereby the vendor agreed to sell to the vendee one-half of certain mill premises, in consideration of the vendee furnishing and placing all necessary machinery, complete, in the mill then erected, for the running of three run of stone. At the same time the vendee entered into a contract with a third person for the latter to furnish and put in the machinery by a certain date and for a stipulated price, and at the same time placed in the hands of the vendor a fund sufficient to cover this price to be paid out for the work. For some reason the contractor quit the work without having completed it, and the vendor then paid out an amount in excess of the funds placed in his hands for the necessary completion of the work. *Held* entitled to a lien.

[2] Harvey v. Kelly, 11 Miss. 490.

the discharge of the liability of a third person, and the conveyance is absolute, no lien is retained.[1] Inasmuch, however, as the vendor's lien is based upon the theory that it would be unconscionable that the vendee should hold the land and not pay for it, and as equity regards the substance rather than the form of contracts, it is immaterial, on principle, what shape the refusal or neglect may take. Unless the vendor has evinced an intention, by the acceptance of other security, to release the vendee, it must be presumed that he holds the land in trust to pay what he has agreed as the purchase price; and in the case of conditions annexed to a grant and assumed by the vendee, if the performance of the conditions constituted an inducement to the sale, it is as much a part of the compensation to be paid as if the promise had been to pay the vendor as part of the purchase money a sum equal in amount to the damages sustained by their breach; and the equitable lien will, it is held, attach to the land sold, as well for such damages as for the purchase money.[2]

It does not seem that any of the cases insist that the price must have been paid in money, and the lien may still be enforced although the price was to be paid in specific articles.[3] If the articles are to be furnished at a stipulated price, this will be regarded only as a mere agreement as to the mode in which the money, for the mutual convenience of the parties, might be paid, and will not change the nature of the transaction. On failure to pay in the manner agreed upon, the debt will be again payable in money, and the vendor may sue for the enforcement of his rights.[4]

Again, while the lien only lies for a debt, it must be a debt arising out of the sale of the land against which it is sought to be enforced; and where the sale of personalty enters into the consideration and cannot be clearly distinguished and separated, no lien will be permitted to obtain.[5] It has further

[1] As where the purchaser, in addition to the payment of a sum of money in cash, agreed also to take up certain notes of the vendor held by a bank. Patterson v. Edwards, 29 Miss. 67.

[2] Dayton, etc. R'y Co. v. Lewton, 20 Ohio St. 401; Elliott v. Plattor, 1 N. E. Rep. 222; Bennett v. Shipley, 82 Mo. 448.

[3] Deason v. Taylor, 53 Miss. 700; Winters v. Fain, 47 Ark. 493.

[4] Harvey v. Kelly, 41 Miss. 490.

[5] Wilkinson v. Parmer, 82 Ala. 367.

been held that the debt must be continuous, and that where the same is extinguished by payment the lien is lost, and that a lien once lost by payment of the debt cannot be revived, at least to the prejudice of third persons.[1]

§ 15. **Entire and severable contracts.** An important question will sometimes arise, growing out of the proper construction of the contract of sale, as to whether the contract was entire or severable, and hence as to whether the vendor's lien will extend to and be impressed upon a number of different parcels sold or contracted to be sold by the same instrument or as parts of the same transaction. If the sale of the different parcels is made by distinct and separate contracts, the price being apportioned to each item, the contract is severable, and there can be no lien upon one part of the lands for purchase money due for other parts. But if all of the land was bought for one gross sum, so that there is no means of ascertaining how much was intended for one part and how much for another, the transaction must be regarded as a single and entire contract for the sale of the land as a whole; and it matters not that a price per acre may have been agreed upon as a basis for fixing a price for the whole, nor that the land was conveyed in different parcels, at different times and by separate conveyances. So long as the transaction contemplates a single contract the method of its execution is immaterial, and all of the land will remain subject to the lien of the vendor for any unpaid part of the purchase money.[2]

§ 16. **In sales induced by fraud.** Upon the principle that the vendor has in all cases an equitable lien upon the estate sold for the unpaid purchase money, as between him and the vendee, unless there is either an express or implied agreement to waive such lien, it has been held that where, by the fraud

[1] Exchange Bank v. Bradley, 15 Lea (Tenn.), 279.

[2] A contract to sell ninety-six thousand acres of wild land, of different grades and values, lying substantially in a body, at an average price of $1 per acre, to be conveyed and paid for as and when the same is surveyed and patented to the grantee by the United States, is not as many distinct contracts as there may be conveyances and payments in pursuance thereof, but only one entire contract; and therefore the vendor's lien for any portion of the purchase money thereof remaining unpaid extends to and may be enforced against the whole tract. Coos Bay Wagon Co. v. Crocker, 4 Fed. Rep. 577.

of the vendee, a part of the price of the lands sold in fact remains unpaid, although the vendor supposed he had been paid in full, a lien may be asserted for such unpaid portion.[1] Thus if, upon the sale of land, the purchaser should pay part of the purchase money in lawful coin and part in worthless bills from which nothing could be obtained, the vendee fraudulently representing such bills to be good and collectible, the vendor would have a right to charge the land itself with that part of the purchase money which actually remained unpaid, as an equitable lien upon such land. So, also, if the vendor agree to receive in part payment other lands, with the value of which he is unacquainted, and the vendee thereupon makes false representations as to the character, situation and value of such land so to be given in exchange, whereby the vendor is induced to allow for the same a sum greatly beyond its value, he would be entitled to an equitable lien upon the land sold by him for the amount of the difference in value between the land taken in part payment as it really was and the value as it would have been had the vendee's representations been true. So, too, where a party sold land and received a part of the consideration in money, and for the balance was induced to accept notes and mortgages which were worthless, and which the purchaser knew to be so at the time of the sale, it was held that this constituted a fraud on the vendor, and did not defeat his lien for the purchase money; and this although the vendor, on discovering the worthless character of the notes and mortgages, returned them and received others in their place equally worthless, to the knowledge of the purchaser; as the practicing of a second fraud by the purchaser would not relieve him from the consequences of the former one perpetrated by him.[2] And so, generally, if the vendee in bad faith acquires the legal title, and by imposition or fraudulent artifice evades payment, or pays or offers to pay in worthless commodities, or fraudulently substitutes a different medium of payment from that agreed upon, the vendor's lien will be preserved against the land in the hands of the vendee, a purchaser from him with notice, or a volunteer.[3]

[1] Brown v. Byam, 65 Iowa, 380; Bradley v. Bosley, 1 Barb. Ch. (N. Y.) 125.

[2] Tobey v. McAllister, 9 Wis. 462.

[3] Gee v. McMillan, 14 Oreg. 268; Gilbert v. Bakes, 106 Ind. 558; Brown v. Byam, 65 Iowa, 374; Huff v. Olmstead, 67 Iowa, 598.

§ 17. **Improvements by vendee.** The general rule is that all improvements placed on real estate by the owner while it is incumbered inures to the benefit of the holder of the incumbrance, and their value cannot be claimed against the lien when they savor of the realty, but are subject to it.[1] There is no impropriety in applying this rule to the case of foreclosures of vendors' liens; and in extension of the same principle neither a purchaser nor sub-purchaser in possession when lands are sold under a decree enforcing a vendor's lien will be entitled, as against the purchaser at the sale under the decree, to the crops growing on the lands at the time of the sale.[2]

§ 18. **Minerals.** Coal, limestone, iron and other minerals in a mine and under the soil are real estate, and as such are capable of being conveyed like any other real estate and subject to the same incidents. When such minerals have been severed they become personalty; and as there is no lien in favor of the vendor of chattels, after possession has been delivered to the vendee, it follows that after mining the vendor has no right of recourse against the product of the mine, except as he may obtain any advantage common to every creditor. But being a vendor, and the mineral, until severed, retaining its character as real estate, he has an undoubted right to assert and enforce a lien against the remainder of the mineral conveyed and not removed from the mine.[3]

§ 19. **Assignment of the lien.** It would seem to be the doctrine in England that the vendor may, of course, assign the purchase money unpaid to another and with it his equitable lien;[4] and this doctrine has been approved by some of the state

[1] Baird v. Jackson, 98 Ill. 78.

[2] Johnston v. Smith, 70 Ala. 108.

[3] Manning v. Frazier, 96 Ill. 279. In this case the owner of land conveyed by deed all the coal and other mineral in, upon and under said land, with an express license to enter, mine and remove the same, for which grant the purchaser agreed to pay to the vendor a stipulated price per ton, payable quarterly. It was contended on the trial that the money claimed to be due was not purchase money, but was due, if at all, for and as the price of the coal after it ceased to be real estate. The court held, however, that there had been no payment of the price of the mineral as land, and that a lien would lie against the mineral not removed, which might be enforced by sale; that the price agreed to be paid per ton was only a mode of ascertaining the amount of the purchase money to be paid for the mineral in mine.

[4] 2 Sugden on Vend. (8th Am. ed.) 398.

courts of this country, upon the principle that the transfer of a debt carries with it the security which exists for its payment.[1] The great preponderance of authority, however, maintains the contrary,[2] and the rule is now generally accepted that the lien which arises by implication of law in favor of the vendor is personal in its nature, and not assignable or transmissible, even by express language;[3] that it is personal to the vendor, and can be enforced only by him[4] and for his own benefit.[5]

There can be no doubt that if the lien existed by contract the rule would be different, and it is undoubtedly upon a construction of this kind that its assignment has been permitted in states where such assignments have been recognized. It is not like an ordinary lien, however, a specific absolute charge upon the property, but is rather a simple right to resort to the property upon failure of payment by the vendee; it exists by implication only and not by contract, and though it has been called an incident to the contract it is not an incident which springs out of the contract, but on the contrary is an equity which seems to be independent of it. Indeed, it is not an incident in any just definition of the word, and can in no proper sense be said to have any existence until it has been called into being by the decree of a court of competent jurisdiction. For this reason, if none other, it cannot be assignable; for, as has been justly said, "How can that be negotiable which is dependent for its entity on a judgment of a court?"[6]

[1] See Griffin v. Camack, 36 Ala. 695; Grigsby v. Hair, 25 Ala. 327; McAlpin v. Burnet, 19 Tex. 497; Kern v. Hazlerigg, 11 Ind. 443; Rakestraw v. Hamilton, 14 Iowa, 147; Cummings v. Oglesby, 50 Miss. 153.

[2] Williams v. Young, 21 Cal. 228; Webb v. Robinson, 14 Ga. 216; Shall v. Biscoe, 18 Ark. 142; Wing v. Goodman, 75 Ill. 159; Dayhuff v. Dayhuff, 81 Ill. 499; Briggs v. Hill, 6 How. (Miss.) 362; White v. Williams, 1 Paige (N. Y.), 506.

[3] Markoe v. Andras, 67 Ill. 34; Keith v. Horner, 32 Ill. 524; Hecht v. Spears, 27 Ark. 229; Lindsey v. Bates, 42 Miss. 397; Horton v. Horner, 14 Ohio, 437; Green v. Demoss, 10 Humph. (Tenn.) 371; Wellborn v. Williams, 9 Ga. 86; Baum v. Grigsby, 21 Cal. 176.

[4] Small v. Stagg, 95 Ill. 39; Wellborn v. Williams, 9 Ga. 86; Lindsey v. Bates, 42 Miss. 397; Green v. Demoss, 10 Humph. (Tenn.) 374; Jackson v. Hallock, 1 Ohio, 320; Gilman v. Brown, 1 Mason (C. Ct.), 221.

[5] Elder v. Jones, 85 Ill. 384; Baum v. Grigsby, 21 Cal. 172; Bush v. Kinsley, 14 Ohio, 20.

[6] Wellborn v. Williams, 9 Ga. 86; Gilman v. Brown, 1 Mason (C. Ct.), 221; Green v. Demoss, 10 Humph. (Tenn.) 374; Moshier v. Meek, 80 Ill. 79; Baum v. Grigsby, 21 Cal. 173.

The lien, in its very essence, exists solely for the security of the vendor, and grows out of the natural justice of allowing a party to reach property which he has transferred to satisfy the debt which constitutes the consideration of the transfer. The assignee of a note given for the purchase money, or a transferee of the vendor's claim, stands in a very different position. He has not parted with the property which he seeks to reach in consideration of the note he has received; and having never held the property, he has no special claim in equity to subject it to a sale for his benefit. The relation of vendor and vendee is a condition precedent to the creation of the lien, while the simple relation of debtor and creditor or borrower and lender is incompatible with its existence.[1]

Where the lien has been permitted to pass by an assignment of the debt or the instruments which evidence such debt, it has been considered in the light of an equitable mortgage, and the vendor as possessed of a mortgagee's rights. The debt is regarded as the principal, the lien a mere incident, and hence the transfer of the debt is held to carry with it the mortgage security.[2]

§ 20. **Waiver of lien.** As vendors' liens are secret, unknown to the world, and often productive of much hardship, they are not encouraged by the courts, and should not be extended beyond the requirements of the settled principles of equity.[3] If the vendor did not rely on his lien it should be regarded as waived,[4] and any act or declaration on his part which shows that he does not rely upon it or has abandoned it operates to prevent it from attaching or destroys it after it has attached.[5] These principles are always strenuously enforced; and even though the vendor may do no act which would indicate a voluntary waiver the lien may still be lost as a result of his own acts or by his failure to act, and for all practical purposes become extinguished.[6]

[1] Iglehart v. Armiger, 1 Bland's Ch. (Md.) 523.

[2] Kern v. Hazlerigg, 11 Ind. 443; Perry v. Roberts, 30 Ind. 245; Church v. Smith, 39 Wis. 492; Ellis v. Singletary, 45 Tex. 27.

[3] Richards v. Leaming, 27 Ill. 431; Cowl v. Varnum, 37 Ill. 181.

[4] Doolittle v. Jenkins, 55 Ill. 400; Kirkham v. Boston, 67 Ill. 599; Baum v. Grigsby, 21 Cal. 172.

[5] Moshier v. Meek, 80 Ill. 79; Neal v. Speigle, 33 Ark. 63; Stevens v. Rainwater, 4 Mo. App. 292.

[6] Moshier v. Meek, 80 Ill. 79.

The vendor's lien not being in writing or created by contract, and being only implied in equity, requires no writing to effect a release; and as it exists only by inference, anything that indicates that it is not relied on or is waived may be shown to rebut such inference.[1] But, while this is the law, it is equally true that so long as the debt exists courts will not presume that it has been surrendered without satisfaction, unless upon clear and convincing testimony. The burden of proof of a waiver rests upon the party alleging it; and as such waiver is largely a matter of intention, if it be doubtful from all the facts and circumstances the lien will be presumed to be still in force.[2] Nor is it necessary for the vendor, in an action to enforce his lien, to allege that he has not waived the same; or, if the action is against a third party, that such defendant took with notice, for waiver or want of notice must be set up in the pleadings of the defendant and proved as defense.[3]

§ 21. What amounts to waiver or abandonment. It is a settled doctrine that any act or declaration of the vendor evincing an intention to release his equitable lien, or which shows that he does not rely upon it, is sufficient to constitute a waiver of the same,[4] and, as a rule, a court of equity cannot revive a lien which has thus been waived.[5] Where there has been an express agreement of waiver this result will follow as a matter of course,[6] while the authorities are quite united in declaring that the taking of other and independent security operates as a waiver and extinguishment of the lien.[7] The

[1] Moshier v. Meek, 80 Ill. 79; Hightower v. Rigsby, 56 Ala. 126; Pillow v. Helm, 7 Baxter (Tenn.), 545; Anderson v. Donnell, 66 Ind. 150; Stuart v. Harrison, 52 Iowa, 511.

[2] Coles v. Withers, 33 Gratt. (Va.) 186; Wilson v. Lyon, 51 Ill. 166.

[3] Seymour v. McKinstry, 106 N. Y. 230.

[4] Moshier v. Meek, 80 Ill. 79; McGonigal v. Plummer, 30 Md. 422; Buntin v. French, 16 N. H. 592; Dibble v. Mitchell, 15 Ind. 435; Parker v. Lowell, 24 Tex. 238; Selby v. Stanley, 4 Minn. 65; Griffin v. Blanchard, 17 Cal. 70; Redford v. Gibson, 12 Leigh (Va.), 332; Clark v. Hunt, 3 J. J. Marsh. (Ky.) 553; Carrico v. Farmers' Bank, 33 Md. 242; Hare v. Van Deusen, 32 Barb. (N. Y.) 92.

[5] Burger v. Potter, 32 Ill. 66; Exchange Bank v. Bradley, 15 Lea (Tenn.), 279.

[6] McLaurie v. Thomas, 39 Ill. 291. An express contract that the vendor's lien shall be retained to a specified extent is equivalent to a waiver of the lien to any greater extent. Brown v. Gilman, 4 Wheat. (U. S.) 255.

[7] Cowl v. Varnum, 37 Ill. 181; Mc-

lien is not waived, in the absence of an express agreement to that effect, by the fact that the vendor takes the note or other personal security of the vendee for the money, for such personal security is considered only as intended to meet and overcome the acknowledgment of the receipt of the purchase money in the deed;[1] but the acceptance of a mortgage on the land or of other property[2] will ordinarily be deemed a waiver, while the same effect results from a deposit of stock or a pledge of goods.[3] Accepting the responsibility of a third person has ever been held to work a waiver,[4] as where the vendor takes a bill of exchange drawn by the vendee upon a third person and by him accepted;[5] or a note of a third person indorsed by the vendee;[6] or the vendee's own note with surety[7]

Laurie v. Thomas, 39 Ill. 291; Dodge v. Evans, 43 Miss. 570; Carrico v. Farmers' Bank, 33 Md. 235; Mayham v. Coombs, 14 Ohio, 428; Mattix v. Weand, 19 Ind. 151; Shelby v. Perrin, 18 Tex. 515; Camden v. Vail, 23 Cal. 633; Brown v. Gilman, 4 Wheat. (U. S.) 255; Durette v. Briggs, 47 Mo. 356.

[1] Baum v. Grigsby, 21 Cal. 172; Conlee v. Conlee, 87 Ind. 249.

[2] Chicago, etc. Land Co. v. Peck, 112 Ill. 408; Young v. Wood, 11 B. Mon. (Ky.) 123; Manly v. Slason, 21 Vt. 277; Hummer v. Schott, 21 Md. 311; Hadley v. Pickett, 25 Ind. 425; Camden v. Vail, 23 Cal. 633. A vendor's lien may be lost by taking a mortgage wherein the price of the land and of other land are so blended as to be inseparable. Ortman v. Plummer, 52 Mich. 76. So, also, where land and personalty are sold for a gross price, no agreement being made as to the proportion of the price for each, and no possibility of ascertaining it, it must be presumed that the vendor did not look solely to the land, but had waived his lien. Stringfellow v. Ivie, 73 Ala. 209. Taking a mortgage for a portion of the purchase money is a waiver of the lien for the rest. Briscoe v. Callahan, 77 Mo. 134. But see Elliott v. Plattor, 43 Ohio St. 198, where it was held that where a mortgage is not substituted security, nor taken in pursuance of an intention to waive a vendor's lien, taking it does not defeat the lien.

[3] Lagow v. Badollet, 1 Blackf. (Ind.) 416. Although it has been held that the lien is not lost by the acceptance of securities that have no legal validity. Gilbert v. Bakes, 106 Ind. 558.

[4] Cowl v. Varnum, 37 Ill. 181; Faver v. Robinson, 46 Tex. 304; Fonda v. Jones, 42 Miss. 792; McGonigal v. Plummer, 30 Md. 422; Porter v. Dubuque, 20 Iowa, 440; Sears v. Smith, 2 Mich. 243.

[5] Boynton v. Champlain, 42 Ill. 57; Campbell v. Baldwin, 2 Humph. (Tenn.) 248; Foster v. Trustees, 3 Ala. 302. Otherwise, however, if it is never accepted by such third person. Knisely v. Williams, 3 Gratt. (Va.) 265.

[6] Cresap v. Manor, 63 Tex. 485. Even though it proves worthless. Kendrick v. Eggleston, 56 Iowa, 128.

[7] Richards v. Leaming, 27 Ill. 432; Follett v. Reese, 20 Ohio, 546; Grif-

or indorser;[1] or where, at the time of the sale, the vendor takes from the vendee a bond, with the responsibility of a third person as security for the purchase money.[2] From every circumstance of this character, in the absence of unequivocal evidence to the contrary, a court of equity will presume that the vendor did not trust to the property as a pledge for the security of his money, and hence, as he did not rely upon his equitable lien, it has been abandoned.[3]

The transfer by indorsement of the notes given for the purchase money is usually regarded as an extinguishment of the lien,[4] upon the principle that the vendor no longer occupies the position of creditor to his vendee, while by such an act he is regarded as having received his pay.[5] But the doctrine, while receiving general approval, is nevertheless subject to qualification; and in a number of instances it has been held that the lien is not absolutely extinguished by such assignment where the liability of the vendor continues upon the note by reason of his indorsement, but is rather held in a sort of abeyance, and may be revived by the vendor after he shall have paid the note on his liability as indorser.[6]

The acceptance of other security than the purchaser's note, while it raises a presumption of waiver and will always be regarded as *prima facie* evidence of an intention to abandon the lien, does not, however, work an estoppel. The presump-

fin v. Blanchard, 17 Cal. 74; Fonda v. Jones, 42 Miss. 792. So, also, where the purchaser resold, and he and the sub-purchaser gave to the vendor their joint note payable on the same day as the purchaser's note, it being agreed with the vendor that he should hold the joint note as collateral, and sell it in case of default, *held*, that he waived his vendor's lien. Carroll v. Shepard, 78 Ala. 358. But see Cummings v. Moore, 61 Miss. 184, where it was held that a vendor's lien is not discharged by merely substituting for his vendee's note that of a subvendee.

[1] Marshall v. Christmas, 3 Humph. (Tenn.) 616; Burger v. Potter, 32 Ill. 66; Foster v. Trustees, 3 Ala. 302. But when the note recites the purchase as the consideration and describes the land, it has been held that this rebuts the presumed waiver. Tedder v. Steele, 70 Ala. 347.

[2] McGonigal v. Plummer, 30 Md. 422.

[3] A vendor's lien is lost by securing a judgment for the unpaid purchase money. Crans v. County Commissioners, 87 Ind. 162.

[4] Richards v. Leaming, 27 Ill. 431.

[5] Moshier v. Meek, 80 Ill. 79; Elder v. Jones, 85 Ill. 384.

[6] Bush v. Kinsley, 14 Ohio, 20; Lindsey v. Bates, 42 Miss. 397.

tion is by no means conclusive, and may be repelled by evidence showing that the lien was to be retained,[1] and sometimes by facts which may demand equitable interference to protect the parties from fraud or oppression.[2] Hence it has been held that the vendor's lien is not lost by the acceptance of securities that have no legal validity,[3] or where a fraudulent substitution is made for the securities intended.[4]

Laches or delay may amount to or at least be evidence of a waiver; as, where the vendor fails to institute proceedings to enforce the lien within a reasonable time after his right to do so attaches, he may be presumed to have abandoned or waived the same.[5]

An express contract of any kind directly concerning the purchase money or the land will usually be held to supersede all legal implications respecting the retention of the lien whenever it is to any appreciable extent inconsistent with the continued existence of such lien;[6] and the authorities seem to be united in sustaining the proposition that a mutual agreement, orally expressed, that the vendor's lien was not to be relinquished is sufficient to overcome the implication of the contrary intention raised by the mere act of taking other security, if made at the time such other security is taken.[7]

[1] Manly v. Slason, 21 Vt. 271; Anketel v. Converse, 17 Ohio St. 11; Hunt v. Marsh, 80 Mo. 396; Lord v. Wilcox, 99 Ind. 491; Baum v. Grigsby, 21 Cal. 172.

[2] Coit v. Fougera, 36 Barb. (N. Y.) 195; Tobey v. McAllister, 9 Wis. 463. As where A. sold B. a farm, taking part payment in cash, and for the residue A. subsequently accepted a bond to convey certain village property. Through a conspiracy and by fraudulent representations B. induced A. to give up the bond and to accept in its place a worthless railroad bond. *Held*, that this did not amount to a resale of the village property, and that A. was entitled to a vendor's lien on the farm. Brown v. Byam, 65 Iowa, 374.

[3] Gilbert v. Bakes, 106 Ind. 558.

[4] Thus, if the purchaser agrees to give a certain mortgage as security, but puts on record a different mortgage, the vendor is not deprived of his lien. Huff v. Olmstead, 67 Iowa, 598. So, too, where the purchaser, instead of tendering a good, negotiable, bankable note, as he had agreed to do, conveys the land to his wife and tenders his own note, which is worthless. Gee v. McMillan, 14 Oreg. 268.

[5] Trustees of Schools v. Wright, 11 Ill. 603.

[6] Manly v. Slason, 21 Vt. 276; Fish v. Howland, 1 Paige (N. Y.), 20.

[7] Napier v. Jones, 47 Ala. 90; Fonda v. Jones, 42 Miss. 792; Daughday v. Paine, 6 Minn. 443; Moshier v. Meek, 80 Ill. 79; Fish v. Howland, 1 Paige (N. Y.), 20.

§ 22. **Vendee cannot deny vendor's title.** The relation of vendor and purchaser after conveyance but before the full payment of the purchase money is not dissimilar from that which exists between a vendor and a vendee in possession under an executory contract. Where there has been no fraud and no eviction, actual or constructive, the vendee or party in possession under him cannot controvert the title of the vendor upon a bill to enforce a lien for the purchase money.[1] In such cases, the vendee and those claiming under him must rely upon the covenants of title in the deed of the vendor; it is these which measure the right and remedy of the vendee, and if there are no such covenants, in the absence of fraud, he can have no redress.[2] A different result would subvert the contract of the parties, and substitute for it one which they did not make. In such cases the vendor by his covenants, if there are such, agrees upon them, and not otherwise, to be responsible for defects of title. If there are no covenants he assumes no responsibility, and the other party takes the risk. The vendee agrees to pay according to his contract, and secures payment by giving a lien upon the property.[3]

§ 23. **Proceedings for enforcement.** In a suit to enforce a vendor's lien not only should the vendee be made a party thereto, but all others who claim by, through or under him by a record title, as well as all persons in possession of the land if their rights are to be concluded.[4] If the vendee is dead his heirs are necessary parties, as are also his personal representatives;[5] but strangers to the title or those claiming adversely thereto need not be made parties.[6]

Wherever the lien obtains it is now generally regarded as personal to the vendor and enforceable only by him, and that

[1] Robinson v. Appleton, 22 Ill. App. 351.

[2] Patton v. Taylor, 7 How. (U. S.) 159; Abbott v. Allen, 2 Johns. Ch. (N. Y.) 519. That the vendor is insolvent, or absent from the state, or that an adverse suit is pending which involves the title, does not withdraw the case from the operation of this principle. Butler v. Hill, 6 Ohio St. 218.

[3] Peters v. Bowman, 96 U. S. 58.

[4] Foster v. Powers, 64 Tex. 247.

[5] Lord v. Wilcox, 99 Ind. 491; Sommerville v. Sommerville, 26 W. Va. 479. In a suit to enforce a vendor's lien against the estate of a deceased vendee the personal property should first be applied before ordering a sale of the real estate. Id.

[6] Wells v. Francis, 7 Colo. 396.

in case of death it passes to his personal representatives and not to the heir.[1]

§ 24. **Burden of proof.** Unless there is something in the deed to disprove or cast discredit upon the granting clause, which, as a rule, recites the payment of consideration, such statement of the payment of the purchase price must be taken as true, and is *prima facie* evidence of that fact. The recital of the payment of consideration is always open to impeachment, however, and the fact may be disproved by competent evidence; but the burden of explanation or of showing non-payment is upon the vendor or the person seeking to establish the lien.[2]

A vendor's lien is not waived or destroyed by the recital of payment in the deed, which has no other effect than to impose the burden of showing non-payment on the part of the vendor; and when this has been satisfactorily accomplished the law will raise the presumption that the vendor's lien exists, and the burden of proof to show its non-existence, as that the lien has been waived or relinquished, or to show circumstances which repel the presumption, is cast upon the vendee or the person who denies the equity.[3] Nor is it necessary in an action by the vendor to enforce his lien to allege in his pleading that he has not waived his lien; or, if against a subsequent purchaser, that the defendant took with notice, as waiver or want of notice must be set up in the answer and proved as a defense.[4]

§ 25. **Purchaser's defenses.** Aside from the technical defenses of waiver, extinguishment or abandonment, as detailed in the paragraphs preceding, the purchaser has a right to rely upon any defense that would be available in an action of *assumpsit* for the purchase money. Thus, if the maker of a promissory note for the price of land, payable at a bank, had funds there, and suffered loss by non-presentation, this would be a good defense to a bill to enforce a vendor's lien.[5]

[1] Evans v. Enloe, 70 Wis. 345; Robinson v. Appleton, 22 Ill. App. 351.

[2] Kelly v. Karsner, 2 So. Rep. (Ala.) 164.

[3] Campbell v. Baldwin, 2 Humph. (Tenn.) 258; Benedict v. Miller, 85 N. Y. 626; Briscoe v. Bronaugh, 1 Tex. 326; Manly v. Slason, 21 Vt. 271; Dodge v. Evans, 43 Miss. 576; Hays v. Horine, 12 Iowa, 61; Crampton v. Prince, 83 Ala. 246.

[4] Seymour v. McKinstry, 106 N. Y. 230.

[5] Sims v. Com. Bank, 73 Ala. 248.

It would seem, however, that the foregoing rules apply only to meritorious defenses, and not to a defense of a strictly technical character. Thus, where a married woman purchases land and gives her note therefor, while her coverture might be a complete defense to an action against her at law on her note, yet it would be no answer to a suit in equity to enforce a vendor's lien against the land; for it is as unconscionable for a person under disability to get the land of another and keep it without paying the purchase money as for one *sui juris* to do the same thing.[1] So, also, courts will not refuse to enforce a vendor's lien because the purchaser was not of full age when he purchased, he being apparently of full age;[2] and these rules apply with extra force where there has been a long acquiescence in the sale and the purchaser has enjoyed the use of the land.

A sub-purchaser defending against a bill to enforce a vendor's lien must allege that he is a purchaser from one in actual or constructive possession, claiming to be seized of the legal title, and set out the substantial contents of the deed of purchase; that he purchased in good faith; that he paid a valuable consideration; that he had no notice of complainant's equity, nor of any facts to put him on inquiry.[3]

§ **26. Rents and profits.** In a proceeding to enforce a vendor's lien, where the vendor has had the possession and control of the property, the vendee should, it seems, be credited with a share of whatever the vendor may have received in respect to the use and enjoyment of the property proportioned to the amount he may have paid on his purchase.[4]

§ **27. Concurrent remedies.** While there may be an apparent hardship in subjecting a party to the double vexation of an action at law and a suit in equity for the recovery of the same debt, yet such a procedure is not in violation of law, and concurrent remedies are usually permitted where they are not inconsistent with each other. Thus, it has been settled that a creditor by note and mortgage has several remedies, either and all of which he may pursue until his debt is satisfied.[5] A judgment on the note without satisfaction would be no bar to a proceeding in equity to foreclose the mortgage, or

[1] Crampton v. Prince, 83 Ala. 246.
[2] Smith v. Henkel, 81 Va. 524.
[3] Hooper v. Strahan, 71 Ala. 75.
[4] Grove v. Miles, 71 Ill. 376.
[5] Vansant v. Allmon, 23 Ill. 30.

the two suits might be pending at the same time. Upon the same principle a vendor may sue at law upon the note given for the purchase money, and at the same time proceed in equity to enforce a lien reserved in his deed for the payment of the same.[1] This would seem eminently proper and in accordance with sound legal principles; yet there is a class of cases which hold otherwise, and under which it is held that a vendor's lien is lost by securing judgment for the unpaid purchase money.[2]

§ 28. **As affected by the statute of limitation.** As to the time within which a vendor may proceed to foreclose his lien, the authorities are inharmonious and contradictory. It has been held positively, in some of the states, that if an action to enforce collection of the purchase money is barred the lien ceases to be available,[3] while in others a directly contrary result has been obtained, and the lien has been held enforceable in equity notwithstanding the debt has been barred at law.[4] In the former cases the doctrine is upheld upon the principle that the statutes of limitation are essentially statutes of repose, and that while the lien is permitted to be a charge upon the land, it is not the policy nor in accordance with the analogy of the law that it should exist longer than the statutory existence of the note or other evidence of the debt.[5] In the latter cases it is contended that the principle which preserves liens, notwithstanding the bar of the debt, is neither confined to those secured by a conveyance — as, for example, a mortgage — nor to those reserved by a sealed instrument, nor even to those provided by an express contract; and as the statute does not extinguish the debt, but merely bars the remedy at law, there is no inconsistency in the prosecution of another remedy after the action at law is barred.[6]

[1] Palmer v. Harris, 100 Ill. 276; Chapman v. Lee, 64 Ala. 483.

[2] Crans v. County Comm'rs, 87 Ind. 162.

[3] Borst v. Corey, 15 N. Y. 505; Trotter v. Erwin, 27 Miss. 772; Hanna v. Wilson, 3 Gratt. (Va.) 243; Sheratz v. Nicodemus, 7 Yerg. (Tenn.) 9; Stephens v. Shannon, 43 Ark. 464. And this, too, notwithstanding such lien is reserved on the face of the deed. Tate v. Hawkins, 81 Ky. 577.

[4] Moreton v. Harrison, 1 Bland (Md.), 491; Shorter v. Frazer, 64 Ala. 80.

[5] Or, in case the purchase money is not evidenced by writing, then the time allowed by law for the collection of debts by suit. Ilett v. Collins, 103 Ill. 74.

[6] Relfe v. Relfe, 31 Ala. 500; Lingan v. Henderson, 1 Bland (Md.), 236.

But this latter doctrine, while permitted to prevail in a few states, is clearly opposed to the weight of authority, which unqualifiedly pronounces in favor of the rule first stated. Where, therefore, the debt is barred by the statute of limitations no lien will exist that can be enforced; and where the fact that the debt is barred appears on the face of the pleadings, advantage may be taken of the bar on demurrer.[1]

§ 29. **Vendor's lien and mechanic's lien.** Where a contract for the sale of real estate is of record, showing that the same has not been paid for at the time that mechanics and material-men enter into contracts for work and labor thereon, under which they afterward acquire liens for such labor and materials, such liens will be postponed, at least as far as the land, independent of the improvements, is concerned, to the lien of the vendor for the purchase money; and although the vendor may, after the work and material have been expended, convey the land and take the notes of the purchaser secured by mortgage on the premises for the purchase money, his lien will not thereby be postponed to those of the mechanics or material-men, but will be prior and superior to them as to the land without improvements, though a subsequent lien as to the improvements made on the land after the purchase.[2]

§ 30. **Vendee's lien.** The equities of a vendee who pays money on a contract of sale are as strong as those of a vendor who does not receive full payment for the land he sells, and the principle that applies in such cases is closely analogous to the principle of subrogation.[3]

[1] Ilett v. Collins, 103 Ill. 74; Caldwell v. Montgomery, 8 Ga. 108.

[2] Hickox v. Greenwood, 94 Ill. 266, under a statute giving prior incumbrancers a preference to the extent of the value of the land at the time of making the contract, and the mechanic or material-man a preference in respect to the value of the improvement. So, also, it has been held in Wisconsin that the lien of mechanics and material-men is subordinate to that of the vendor of the land on which the building is erected, for the unpaid purchase money; and if, after the building is erected, the vendor of the land executes a deed therefor to the vendee, and at the same time takes from him a mortgage thereon for the unpaid purchase money, the mortgage is to be regarded as only a continuance of the vendor's lien, and his preference over the liens of the mechanic and material-man still remains. Rees v. Luddington, 13 Wis. 276.

[3] Stults v. Brown, 112 Ind. 370; Lowrey v. Byers, 80 Ind. 443.

b. *Where the Vendor Retains Title.*

§ 1. The theory.
2. Nature of the lien.
§ 3. Limitation of the right to foreclose.
4. Implied waiver.

§ 1. The theory. In addition to the well-known form of the vendor's equitable lien as described in the preceding paragraphs, there also exists in equity a lien of an indefeasible character and secured by the legal title. In some states this form of a vendor's lien can hardly be said to have any specific recognition as such, although it practically exists in every state. It occurs in cases where the vendee goes into possession under a contract for conveyance, and proceeds upon the familiar theory that the vendor is but a trustee to the vendee for the conveyance of the title, and the vendee is but a trustee for the payment of the purchase money and the performance of the terms of the purchase. The vendor in such case is said to hold the legal title as a security for the unpaid purchase money, standing in the position of an equitable mortgagee, and the security which he thus retains is frequently, and perhaps not improperly, denominated a vendor's lien.

The equitable estate of the vendee is in such cases alienable, descendible and devisable in like manner as real estate held by legal title;[1] but as the right to the estate does not carry with it a right to the possession, a mere possession in fact for any period less than twenty years would not impair or materially affect the lien of the vendor thus acquired. The vendee, though in possession, is deemed to occupy the land under and by virtue of a license from his vendor, unless the agreement expressly confers the right, and he is not permitted to dispute the title of his vendor any more than a lessee can dispute that of his lessor, while any other person coming into possession under the vendee, either with his consent or as an intruder, is bound by a like estoppel.[2] Although the debt be barred by

[1] Lewis v. Hawkins, 23 Wall. (U. S.) 119; Jones v. Lapham, 15 Kan. 540; Anderson v. Ames, 6 Md. 52; Button v. Schroyer, 5 Wis. 598.

[2] Robinson v. Appleton, 124 Ill. 276; Moore v. Anders, 14 Ark. 128; Jackson v. Walker, 7 Cow. (U. S.) 637; McCaslin v. State, 44 Ind. 151; Driver v. Hudsputh, 16 Ala. 348; Pitts v. Parker, 44 Miss. 247; Church v. Smith, 39 Wis. 492.

legal limitation it cannot avail to protect the land from the vendor's lien upon it and in nowise affects the right of the vendor to proceed in equity against it.[1]

It is claimed by some writers that a vendor's lien, in the proper acceptation of the term, cannot be initiated until the legal title passes from him to the vendee; that inasmuch as the word lien indicates a security in the nature of a mortgage, it is not possible for the vendee to make a mortgage to the vendor before legal title passes, and that it cannot be seriously claimed that the vendor can have a lien on his own land to secure the purchase money before the legal title has vested in the purchaser.[2] The principle as first stated, however, has been recognized in a number of states, and the right of foreclosure or forfeiture which is held by the vendor, while it may not conform to the usual definition of a vendor's lien by implication, is nevertheless such in fact, and in equity is so treated.[3]

§ 2. **Nature of the lien.** Notwithstanding that the lien now under consideration is usually termed a vendor's lien, which in fact it is, it must not be confounded with the vendor's lien by implication, for it possesses none of its characteristics and in no way resembles it, save only in the single circumstance that it represents a security for the unpaid purchase money. In all its essential features it is a mortgage, and the position of the vendor with relation to his vendee is practically that of a mortgagee. "We are not able," observes the court in one case,[4] "to draw any sensible distinction between the cases of a legal title conveyed to secure the payment of a debt, and a legal title retained to secure the payment of a debt; for in both cases courts of equity consider the estate only as security for the payment of the debt, upon the discharge

[1] Harris v. King, 16 Ark. 122; Lewis v. Hawkins, 23 Wall. (U. S.) 119.

[2] See Bing. Actions and Defenses, 336. To call this complete legal title a lien, says Mr. Pomeroy, is certainly a misnomer. In case of a conveyance, the grantor has a lien, but no title. In case of a contract for sale before conveyance, the vendor has the legal title, and has no need of any lien. Pom. Eq. Jur. § 1260. But see, *contra*, Story's Eq. § 788.

[3] Dukes v. Turner, 44 Iowa, 575; Scroggins v. Hoadley, 56 Ga. 165; Merritt v. Judd, 14 Cal. 59; Masterson v. Pullen, 62 Ala. 145.

[4] Graham v. McCampbell, Meigs (Tenn.), 56.

of which the debtor is entitled to a conveyance in the one instance and a reconveyance in the other." In another case[1] it was held that there is no substantial distinction between the case of a vendor who retains title as security for unpaid purchase money, and the case of a vendor who, conveying the title, retains in his deed an express lien for its payment.[2]

It is not necessary that a lien should be expressly reserved in a contract for the sale of land, for the fact that the vendor retains the legal title in himself, and agrees to convey only upon full payment of the purchase money, affords conclusive evidence of his intention to preserve his lien. Indeed, the only purpose of retaining title is that it may serve as a security for the payment of the purchase money, and when that has been paid the vendee becomes the complete equitable owner, and the vendor simply a trustee of the naked title.[3]

§ 3. Limitation of right to foreclose. In many of the cases it is held that the lien of the vendor who has not parted with the legal title is substantially a mortgage;[4] and as the possession of the mortgagor is not adverse to the mortgagee, no rights can accrue that shall prejudice the vendor's interest or interfere with his assertion of the privilege of foreclosure before the time limited by law for the foreclosure of a mortgage. Ordinarily the lien of a mortgage will be presumed to have been satisfied after the lapse of twenty years[5] from the maturity of the debt, and this rule would apply as authority to determine the rights of a vendor in a case similar to that under consideration.[6] Few if any of the states have provided a statutory bar to a suit in equity to foreclose a vendor's lien for the purchase money where the vendor has not parted with the legal title, and in such case the lien must be enforced within a reasonable time;[7] and what is a reasonable time must

[1] Coles v. Withers, 33 Gratt. (Va.) 186; and see Robinson v. Appleton, 124 Ill. 276.

[2] See Lewis v. Boskins, 27 Ark. 63; Moore v. Anders, 14 Ark. 628; Curtis v. Buckley, 14 Kan. 449; Connor v. Banks, 18 Ala. 42; Sparks v. Hess, 15 Cal. 186.

[3] Robinson v. Appleton, 124 Ill. 276.

[4] Lewis v. Hawkins, 23 Wall. (U. S.) 119; Relfe v. Relfe, 34 Ala. 504.

[5] The statute in some states fixes the limitation at a shorter period — in some cases ten years.

[6] Butler v. Douglass, 3 Fed. Rep. 612.

[7] The federal courts hold that a reasonable time is not less than

perhaps be deduced from the analogy of other actions, and particularly with reference to the period limited for the foreclosure of mortgages. Any other rule would be doing violence to established legal principles, and particularly a rule based upon the statutory limitation to proceed at law for the collection of debts. Hence, it would seem that, notwithstanding that the legal remedy upon the bond or notes for the purchase money is barred by limitation, the right of the vendor to proceed against the land in equity is in nowise impaired or affected, and the lien will be presumed to have been satisfied only after the lapse of twenty years from the time of the maturity of the debt.[1]

§ 4. **Implied waiver.** As has been shown in the former article of this chapter the implied lien of the vendor may also be waived by implication, facts and circumstances attending the transaction being sufficient to create a legal manifestation of intention of abandonment. But the principles there stated apply only to cases where there has been a conveyance of the legal title to the purchaser. Where no deed has been executed by the vendor very different considerations govern. In such cases the question of implied waiver does not and cannot arise, and the taking of distinct personal or collateral security in no way affects the force or operation of the lien. By retaining the title the vendor has manifested, in the most unmistakable manner, his purpose of looking to the land as security for his debt; and equity will never compel him to part with the title until he has actually received the consideration.[2]

Nor does the fact that the agreement of sale or bond for title provides for forfeiture of the contract and of all payments made thereunder, if default is made in any of the terms, show any intention of waiver of lien on the part of the vendor. This would be the case even if the lien could be affected by the taking of other security; for while it is true that such forfeiture

twenty years. Butler v. Douglass, 3 Fed. Rep. 612; Boone v. Chiles, 10 Pet. (U. S.) 177; Lewis v. Hawkins, 23 Wall. (U. S.) 119.

[1] Lewis v. Hawkins, 23 Wall. (U. S.) 119.

[2] Coles v. Withers, 33 Gratt. (Va.) 186; Knisley v. Williams, 3 Gratt. (Va.) 265; Chapman v. Tanner, 1 Vt. 267.

clause is security for prompt payment, yet it is a security on the land sold, and is intended for the benefit of the vendor, who may enforce it or not at his pleasure. Until the vendor avails himself of such clause the rights and liabilities of the parties remain as if no such clause had been inserted, and the vendor may still enforce payment. The vendee or his assignee can take no advantage of it.[1]

[1] Robinson v. Appleton, 124 Ill. 276.

Art. II. By Contract.

§ 1. General principles.
2. By express reservation.
3. Formality of expression.
4. Recital of the fact of unpaid purchase money.
5. Assuming incumbrance as part of the purchase money.
6. Vendor's lien on crops.
7. Reservation by separate instrument — Equitable mortgages.
8. Not affected by subsequent mortgage.
9. Not affected by independent security.
10. Not affected by action at law.
11. As affected by limitation — Presumption of payment.
12. Assignment and transfer.
13. Subrogation of co-purchaser.

§ 1. General principles. The doctrine of equitable liens, though prevalent in many of the states, has been expressly denied in others, partly upon the ground that the doctrine has grown up in England since the foundation of the colonies, and hence not included in the law as brought by the colonists, but more, perhaps, that it is opposed to the policy of our legislation, the spirit of the recording acts, etc. The implication that there is an intention to reserve a lien for purchase money in all cases where the parties do not by express acts evince a contrary intention is, it is contended, in almost every case, inconsistent with the truth of the fact, and in all instances, without exception, in contradiction of the express terms of the contract which purports to be a conveyance of everything that can pass; and for this reason the construction which, independently of fraud or mistake, reserves an interest against the express language of the parties is held to be unnatural and unjust. Under these decisions, where there is nothing on the face of the deed to show that any portion of the purchase money remains unpaid, the formal acknowledgment of its receipt is held to imply a fully-executed contract on the part of the vendee, and delivery of the deed is taken to import full execution on the part of the vendor. Between parties, therefore, whose writings show such a face, it is held that there is no ground for implying unexecuted covenants or liens to secure the performance of them.[1]

In those states, therefore, where the foregoing principles obtain recognition, and where a vendor's lien created by mere

[1] See Heister v. Green, 48 Pa. St. 96; Edminster v. Higgins, 6 Neb. 265; Greeno v. Barnard, 18 Kan. 518.

operation of the law or by force of the rules of equity is unknown or disallowed, such a lien can only be raised, either by stipulation in writing to that effect, or by an agreed reservation of the title in the vendor at the time of sale. But even where equitable liens are not favored by law the parties may, by clear and express words in deeds of conveyance, create liens upon land either for the payment of the purchase money or for performance of collateral conditions, which will be binding upon themselves and their privies.[1]

Such a lien would be in nowise impaired by the taking of other security, or by any of the numerous acts which would ordinarily work a waiver or extinguishment of an equitable lien which exists merely by implication of law;[2] and as it arises out of contract it forms a valid right of action which will pass to an assignee, and may be enforced in his favor.[3]

§ 2. **By express reservation.** Where the lien of the vendor arises out of an express contract between the parties, as where there is a distinct reservation upon the face of the deed, it becomes a specific lien, and constitutes an original substantive charge upon the land. The exact nature and legal effect of a lien thus created does not seem to be very well defined. Though often alluded to as a mortgage,[4] it is not in all respects equivalent thereto; yet it differs widely from the ordinary implied lien. It is regarded as essentially a contract,[5] and partakes of the nature and possesses the general characteristics of a mortgage as now understood, while for all practical purposes it is as valid and effectual as though reserved by such an instrument.[6] Being set forth in the very first link of the vendee's chain of title, it

[1] Robinson v. Woodson, 33 Ark. 307; Ober v. Gallagher, 93 U. S. 199; Heister v. Green, 48 Pa. St. 96; Helfrich v. Weaver, 61 Pa. St. 390; Greeno v. Barnard, 18 Kan. 518; Davis v. Hamilton, 50 Miss. 213; Webster v. Mann, 52 Tex. 416.

[2] Carpenter v. Mitchell, 54 Ill. 126; Price v. Lauve, 49 Tex. 74; Dowdy v. Blake, 50 Ark. 205.

[3] Carpenter v. Mitchell, 54 Ill. 126; Moore v. Lackey, 53 Miss. 85; Stratton v. Gold, 40 Miss. 778; Crafts v. Dougherty, 69 Tex. 477.

[4] Davis v. Hamilton, 50 Miss. 213; Smith v. Rowland, 13 Kan. 245; Lincoln v. Purcell, 2 Head (Tenn.), 143.

[5] Markoe v. Andras, 67 Ill. 34. A vendor may reserve a lien for the purchase money, although the agreement of sale made no provision therefor. Findley v. Armstrong, 23 W. Va. 113.

[6] Armentrout's Ex'rs v. Gibbons, 30 Gratt. (Va.) 632; Carpenter v. Mitchell, 54 Ill. 126; Davis v. Hamilton, 50 Miss. 213; Smith v. Rowland, 18 Kan. 245.

affords the same notice to purchasers from him as they would receive from a duly-executed mortgage or trust deed,[1] and all persons so purchasing are thereby notified that a lien has been conceded, not only to the vendor, but to his assigns.[2]

While it is generally conceded that a lien thus created is of equal dignity with a mortgage, some courts have even questioned as to whether a reserved lien is not of a higher nature than a mere mortgage security, upon the principle that a mortgage is usually treated as mere incident to the debt, whereas a lien reserved is an express charge inherent in its nature upon the land, which in equity is the natural primary fund for its payment.[3]

The most commonly accepted view, however, is to regard the reservation of a specific lien in the deed as creating an equitable mortgage; and for all practical purposes, as well as for the determination and settlement of collateral questions, or of matters directly growing out of it, it is so treated.[4]

§ 3. **Formality of expression.** As a rule technical nicety in the method of expressing the reservation of a lien is not required, provided the intention is manifest, and any language which clearly and unequivocally seems to express this purpose will ordinarily be sufficient to create a lien which the vendor can enforce in equity against subsequent purchasers and incumbrancers. The recital of the mere fact of the purchase money remaining unpaid has been held insufficient to show this intention in the absence of any expressions regarding its payment, or to overcome the formal recital of the receipt of the consideration; but a recital of this character in connection with conditions for payment would undoubtedly raise a lien.[5] Thus, if the land is conveyed "charged with the payment," or "sub-

[1] Webster v. Mann, 52 Tex. 416; Stratton v. Gold, 40 Miss. 778; Hall v. R'y Co. 58 Ala. 10.

[2] Carpenter v. Mitchell, 54 Ill. 126; Moore v. Lackey, 53 Miss. 85; Stratton v. Gold, 40 Miss. 778; Webster v. Mann, 52 Tex. 416; Hall v. R'y Co. 58 Ala. 10.

[3] Coles v. Withers, 33 Gratt. (Va.) 186.

[4] Robinson v. Woodson, 33 Ark. 307; Ober v. Gallagher, 93 U. S. 199; Webster v. Mann, 52 Tex. 416; Stratton v. Gold, 40 Miss. 778; Carpenter v. Mitchell, 54 Ill. 126; Schwarz v. Stein, 29 Md. 112; Adams v. Cowherd, 30 Mo. 458; Bozeman v. Ivey, 49 Ala. 75; Daniels v. Moses, 12 S. C. 130.

[5] Heist v. Baker, 49 Pa. St. 9; Moore v. Lackey, 53 Miss. 85; Stanhope v. Dodge, 52 Md. 483; Eichelberger v. Gitt, 104 Pa. St. 64.

ject to the payment," of particularly specified sums of money, this will be enough to show that the vendor still looks to the land for satisfaction, and that he holds the same as security;[1] while a deed containing a description of the notes given for the purchase money, and a recital "to have and to hold on payment of the notes herein above stated," is a sufficient reservation of a vendor's lien.[2] Such recitals are sufficient to impart notice to third persons, and they will be bound to make the necessary inquiries as to whether said sums have been paid.[3]

Nor is it material in what part of the instrument the reservation is made; it may with propriety be placed in the granting clause, but will, it seems, be equally efficacious if appearing only in the *habendum*.[4]

§ 4. Recital of the fact of unpaid purchase money. As to whether the mere recital on the face of a deed that the purchase money remains unpaid, or is to be paid at some future time, or in some particular manner, is sufficient to raise a lien, there appears to be some difference of opinion. In states where the equitable lien by implication is recognized the circumstance would form a strong fact, and probably be permitted to operate as notice;[5] while in some instances where the general doctrine of liens by implication has been denied, it has been held that an intention to create a lien was to be inferred from the fact that a statement of the unpaid purchase money stood in the title.[6] Usually, however, express words are held to be necessary to establish the lien. It is said that while mention may be made of unpaid purchase money, it amounts to nothing more than a simple notice of that fact to a subsequent purchaser, but affords no notice of a lien; that the purchaser may reasonably infer that the vendor trusted the personal credit of his vendee for the purchase money or took other security, or at least that no lien was intended because none was expressed, and that these inferences would seem quite as reasonable as that the parties meant what they did not express — a lien for the unpaid money. It is further

[1] Heist v. Baker, 49 Pa. St. 9; Stanhope v. Dodge, 52 Md. 483.

[2] Blaisdell v. Smith, 3 Ill. App. 150.

[3] Eichelberger v. Gitt, 104 Pa. St. 61.

[4] Blaisdell v. Smith, 3 Ill. App. 150.

[5] See Willis v. Gay, 38 Tex. 463.

[6] See Neas' Appeal, 31 Pa. St. 293.

contended that when the ill consequences of constructive liens are considered, and it is observed how the legislatures and courts have labored to furnish record notice of liens, it is going very far to say that parties may, even by their agreement, create a valid lien; but much too far to imply it from mere notice of the non-payment of purchase money.[1]

§ 5. **Assuming incumbrance as part of the purchase money.** There is another phase of the vendor's lien by express reservation which does not appear to be as generally recognized or understood in this connection as that considered in the last section. This occurs where the deed recites that the land conveyed is subject to an indebtedness of the grantor, naming the amount and stating to whom it is owing, and that the grantee, as a part of the consideration, assumes the payment thereof. Such a recital not only raises a personal liability on the part of the grantee to the incumbrance, but also creates an express lien or charge upon the land for a distinct portion of the purchase money which will follow the land into the hands of all persons claiming under the grantee, and practically possesses all the efficacy of a mortgage.[2]

§ 6. **Vendor's lien on crops.** The question of the right to reserve a lien on crops to be produced between lessor and lessee has frequently been passed upon and the right upheld; and from a review of the English and American cases the doctrine seems to be well settled that a party may transfer a title to crops not then *in esse*, which are to be grown upon the land, and that the property will pass as soon as grown.[3] As between vendor and vendee the decisions relating to the question are not numerous, and it has been contended that the cases upholding such a lien in case of lease proceed solely upon the express ground that the lessor is the absolute owner of the soil, while in case of deed such a reservation, being inconsistent with and repugnant to the grant, is therefore void. It would seem, however, that a vendee of the absolute title is not to be distinguished from a lessee of the possession, and that such a reservation is as much an abridgment of the grant in one case as the other; that in either case it is not void merely

[1] Hiester v. Green, 48 Pa. St. 96. Carpenter v. Mitchell, 54 Ill. 126.
[2] Sidwell v. Wheaton, 114 Ill. 267; See chapter XXVI, *ante*.
[3] Baxter v. Buck, 29 Vt. 465.

because to some extent it is inconsistent with the grant, unless by giving effect to it the grant would become wholly inoperative, and that such a reservation to secure the interest on the purchase money is a valid lien and may be foreclosed.[1]

§ 7. Reservation by separate instrument — Equitable mortgages. Aside from the ordinary technical mortgage, which contains words both of grant and defeasance, it seems a lien may be retained by other writings than the deed, where such writings accurately describe the land and unmistakably show the intention of the parties that such land shall be held and remain subject to the lien. Thus, a note given for the purchase price of land, reciting that fact and describing the land, and stating that a vendor's lien is reserved upon the land, has in several instances been held, in equity, to create a valid mortgage. It is true that such an instrument contains neither words of grant or defeasance, and therefore lacks two of the essential elements which go to constitute a mortgage as ordinarily understood; and in several cases where notes of this character have contained recitals that "this note constitutes a lien," or "this note is to stand for a lien on said land until fully paid," their efficacy as mortgages have been denied, both for this reason and for the further reason that the terms used implied the mere suggestion of a fact and not a stipulation — a statement and not an obligation.[2] But where a note or other writing provides that a "vendor's lien is hereby reserved," it is held that this is not a recital of what has been done or exists, but is a manifest effort, by its own terms and through its own efficacy, to produce the result. This doctrine rests upon the principle that where an attempt to create a security in legal form has failed equity will give effect to the intention of the parties; and so, if a transaction resolve itself into a security, whatever may be its form and whatever name the parties may choose to give it, equity will treat it as a mortgage and enforce the lien.[3]

[1] Darling v. Robbins, 15 Atl. Rep. (Vt.) 177.

[2] See Waddell v. Carlock, 41 Ark. 523.

[3] Robinson v. Woodson, 33 Ark. 307; Ober v. Gallagher, 93 U. S. 199. A purchaser of land executed two notes with sureties, reciting that they were given for land, and providing "In case I fail to pay said notes, I do bind myself," etc., "to convey to said sureties the aforesaid land." Upon default in paying said notes the sureties were held entitled to a mortgage on the lands. Courtney v. Scott, Litt. Sel. Cas. 457. So an instrument re-

It would seem, therefore, that where an instrument merely states in one form or another that liens would be or were retained, but without any expression of indication of intent to create or fix the liens, such statements will be considered as mere assertions and not undertakings, and the instrument will be ineffectual as a mortgage; but where the instrument manifests an intent to charge, subject or pledge property as security for a debt, and the property is fully or sufficiently described, equity will enforce the lien as an equitable mortgage.

citing that the maker had employed counsel to prosecute a claim for certain land, and would at the end of the litigation pay them a certain sum out of the land, was held to be a mortgage. Jackson v. Carswell, 34 Ga. 279. An agreement by the owner to pay the occupant of his land a given sum, conditioned that, if the land should be sold to raise the amount, the occupant would surrender his possession, meantime the use of the land to offset interest, was held to be an equitable mortgage and to charge a lien on the land. Blackburn v. Tweedie, 60 Mo. 505. A purchaser gave his obligation for the purchase of land. On the face of the bond, and immediately below the seal, it was stated that the land should be liable to the debt until the purchase money was paid. It was held in a suit by the assignee of the bond that it was an equitable mortgage. Eskridge v. McClure, 2 Yerg. (Tenn.) 84. The owner of land agreed in writing to pay a sum of money out of the proceeds of sale of lands if they were sold, "it being understood and agreed that the debt was a charge on their joint estate in the land." This was held to charge the land with the payment of the debt. Pinch v. Anthony, 8 Allen (Mass.), 536. A vendor conveyed by absolute deed, but took the notes of his purchaser, in which a lien was reserved on the lands conveyed. Renewal notes were given, containing similar reservations. It was held, in a suit on them, that they constituted a lien on the lands which a court of equity would enforce. Helm v. Weaver, 69 Tex. 143. A deed contained a stipulation that, if notes given in purchase of the land conveyed were not paid at maturity, it should be lawful for the sheriff to sell the lands conveyed to satisfy the notes. The notes were assigned and the assignee brought suit to establish and foreclose a lien on the lands. As the vendor's lien had not passed to the assignee, the case turned upon the clause authorizing the sheriff to sell. It was contended that this provision constituted neither a mortgage nor deed of trust; that there must be words of grant to constitute either. The court held that, although it was not "an ordinary technical mortgage or deed of trust," it was intended to be a security for a debt, and was therefore an imperfect or equitable mortgage. This decision was placed upon the ground that courts of equity look through form to the substance of an agreement and exact no peculiar formula to create a lien on lands. Moore v. Lackey, 53 Miss. 85. The case of Mitchell v. Wade, 39 Ark. 377, seems to sustain the doctrine of the cases last cited.

§ 8. **Not affected by subsequent mortgage.** A reserved lien has practically the effect of a mortgage so far as it creates a pledge of the property until the purchase money has been paid, and will be deemed superior to any charges or incumbrances that the vendee may afterwards place upon the property during its existence. It binds the land in the condition in which the grantee receives it, and attaches equally to all structures and improvements that may be subsequently erected upon it.[1]

§ 9. **Not affected by independent security.** As the reserved lien of the vendor is founded upon express contract, the taking of other and independent security in no way affects it;[2] the land remains holden for the payment of the debt, and, as in the case of a mortgage, is the primary fund for its payment. In no case can the taking of such security be deemed a waiver of the lien so long as the character of the debt remains the same.

The lien in such case, having been raised by express contract and become a matter of record, has the same effect as if a written agreement had been entered into and signed by the parties that the land should be pledged for the payment of the purchase money, and an expressed agreement cannot as a rule be defeated by implication; nor should any presumptions of waiver be permitted to control simply because the vendor may have seen fit to further protect himself by other and additional security.[3]

§ 10. **Not affected by action at law.** An express vendor's lien retained by the deed is not affected by the recovery of judgment and issue of execution on the notes given for the purchase money;[4] and the vendor may still enforce his rights against the land, whether in the hands of the purchaser or of the latter's vendee, who buys with notice of the incumbrance.[5]

[1] Building Ass'n v. Korb, 79 Ky. 190.

[2] Price v. Lauve, 49 Tex. 74; Yancy v. Mauck, 15 Gratt. (Va.) 300; Dunlop v. Shanklin, 10 W. Va. 662; Strickland v. Summerville, 55 Mo. 164; Hurley v. Hollyday, 35 Md. 469; McCaslin v. State, 44 Ind. 151; Bozeman v. Ivey, 49 Ala. 75.

[3] Carpenter v. Mitchell, 54 Ill. 126.

[4] Exchange Bank v. Bradley, 15 Lea (Tenn.), 279.

[5] Dowdy v. Blake, 50 Ark. 205.

§ 11. As affected by limitation — Presumption of payment. Notwithstanding that a reserved lien is generally regarded in the light of a mortgage, and as possessing all the ordinary attributes of a mortgage, it has been held in some states that where a definite time is fixed for the deferred payments, or where the vendor holds a note thus secured, he cannot, in a suit to recover his money, enforce the lien after the debt is barred by the statute of limitation.[1]

With regard to presumptions of payment where the statute has not run upon the debt it would seem that there is considerable diversity of opinion. In several instances it has been held that where a deed contains recitals sufficient to raise a lien — as where the consideration clause or *habendum* shows that the purchase price or some part thereof is unpaid — a notice is thereby afforded which imposes upon a subsequent purchaser the duty of ascertaining as to whether the purchase money has in fact been paid, and that no presumption will result from the further fact that the time for its payment as recited in the deed has gone by.[2] It would seem, however, that even where the doctrine has been announced, if a sufficient time has elapsed to bar an action on the debt as disclosed, the purchaser would be justified in presuming that it had been paid; and that notwithstanding that by reason of renewals the debt still subsisted, yet if this fact was unknown to the purchaser it would not militate against him. It has been held that a vendor cannot by protracted indulgence keep alive his secret privilege after a presumption may fairly arise that the debt is paid, and that if he lie by after the maturity of his debt, taking no measures to enforce his claim, he should be considered as holding his purchaser out to the community as an unincumbered owner. "It would be unreasonable," says Simrall, J., "and fruitful of evil to leave it in the discretion of the vendor to indulge and postpone, whether by renewals or not, so that others may be entrapped to deal with the vendee as a man of substance and then turn upon them and say that

[1] Hale v. Baker, 60 Tex. 217.

[2] See Deason v. Taylor, 53 Miss. 697; Thornton v. Knox, 6 B. Mon. (Ky.) 74; Honore's Ex'r v. Bakewell, 6 B. Mon. (Ky.) 67.

they did so at their risk, and sweep from them that which they trusted."[1]

§ 12. **Assignment and transfer.** Where a debt is secured by an express lien, as where there is an agreement for a lien which creates an equitable mortgage, or where the vendor has not parted with the legal title, an assignment of the debt entitles the assignee to the benefit of the pledge. Thus, if the lien is secured by an express reservation in the deed, which, when recorded, has the effect of a mortgage, the ordinary rules relative to assignment will apply;[2] so, also, where a title bond or agreement is given the effect of the same, so far as it concerns the securing of the purchase money, it is a conveyance of the title and the taking of a mortgage.[3] In such case the vendor holds the legal estate as security for the purchase money, and can assign his contract with the conveyance of the title, and the assignee will acquire the same rights and be subject to the same liabilities as himself.[4]

§ 13. **Subrogation of co-purchaser.** It is said to be an old rule of equity that the right of subrogation does not exist between parties who are equally bound — as, for example, co-partners, co-obligors and co-contractors;[5] and the rule seems to have been followed to some extent in later cases.[6] But the rule as thus broadly stated cannot be said to be generally sustained by recent decisions, and there is much authority qualifying if not denying it so far as the same relates to co-obligors.

The reservation of a lien to secure the payment of the purchase money in a deed executed to two or more purchasers, and the acceptance of such deed by the grantees, has the effect

[1] Avent v. McCorkle, 45 Miss. 221. Compare Byrns v. Woodward, 10 Lea (Tenn.), 444.

[2] Smith v. Rowland, 13 Kan. 245; Webster v. Mann, 52 Tex. 416; Carpenter v. Mitchell, 54 Ill. 126; Davis v. Hamilton, 50 Miss. 213; Stratton v. Gold, 40 Cal. 778; Stanhope v. McLaughlin, 52 Md. 483.

[3] Wilkins v. Humphrey, 1 Cush. (Mass.) 311; Pitts v. Parker, 44 Miss. 247; Sparks v. Hess, 15 Cal. 194; Adams v. Cowherd, 30 Mo. 459; Connor v. Banks, 18 Ala. 42; McConnell v. Beattie, 34 Ark. 113; Lewis v. Hawkins, 23 Wall. (U. S.) 119.

[4] Baum v. Grigsby, 21 Cal. 173; Moore v. Anders, 14 Ark. 628; Dowdy v. Blake, 50 Ark. 205; Crafts v. Dougherty, 69 Tex. 477.

[5] See Bispham, Principles of Equity, § 337.

[6] Engles v. Engles, 4 Ark. 286; Clark v. Warren, 55 Ga. 575.

to create an equitable mortgage. If the land is shared equally between them the implication of law, in the absence of any express agreement, is that they intended to adjust the burden of the purchase in like proportion. The obligation between themselves is that each shall discharge his proportionate share of the burden, and each become the surety of the others to the extent of the debt which the others are to pay.[1] The rule is that where one in the situation of a surety pays the debt of him who is primarily liable, equity will put him in the place of the creditor whose debt he has discharged, and will give him the benefit of the securities which the creditor has obtained from the principal debtor;[2] and notwithstanding that no assignment of the security is actually made, equity will treat it as having in fact been done.[3] This doctrine, which is eminently calculated to do exact justice between persons who are bound for the performance of the same duty or obligation, is not confined to cases of strict suretyship,[4] and the right of contribution between co-purchasers has frequently been recognized and enforced; and where any one of the purchasers in common of an estate bound by a joint lien is called upon to pay any more than his due proportion, he is entitled to stand in the place of the satisfied creditor to the extent of the excess which ought to have been paid out of the other shares.[5]

For the purposes of subrogation it is said there is no difference between a vendor's lien by reservation in the deed and a mortgage given back to secure the purchase money;[6] and as, where the right of subrogation exists as against the principal debtor, it may also be enforced against one claiming under him as a purchaser with notice, so it follows that a co-purchaser who has been subrogated to the vendor's security may enforce his right to reimbursement against a vendee of his co-purchaser, who, after partition, buys with notice of the incumbrance.[7]

[1] Owen v. McGeehee, 61 Ala. 440; Deitzler v. Misler, 37 Pa. St. 82: Chipman v. Morrill, 20 Cal. 130; McGee v. Russell, 49 Ark. 104; Goodall v. Wentworth, 20 Me. 322; Crafts v. Mott, 4 N. Y. 604; Fletcher v. Grover, 11 N. H. 368.

[2] McCormick v. Irwin, 35 Pa. St. 111.

[3] Newton v. Field, 16 Ark. 232.

[4] Schoonover v. Allen, 40 Ark. 136.

[5] Owens v. McGeehee, 61 Ala. 440; Ackerman's Appeal, 106 Pa. St. 1; Neff v. Miller, 8 Pa. St. 347; Simpson v. Gardiner, 97 Ill. 237; Williams v. Perry, 20 Ind. 437.

[6] Dowdy v. Blake, 50 Ark. 205.

[7] Dowdy v. Blake, 50 Ark. 205.

PART V.

REMEDIES AND PROCEEDINGS.

CHAPTER XXVIII.

SPECIFIC PERFORMANCE.

ART. I. OF CONTRACTS IN WRITING.
ART. II. OF CONTRACTS BY PAROL.

ART. I. OF CONTRACTS IN WRITING.

§ 1. General principles.
2. What contracts may be enforced.
3. Can only be of ascertained and existing contract.
4. The parties.
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7. When minors are interested.
8. Jurisdiction — Land in another state.
9. As dependent upon conditions.
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12. Fraud.
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§ 18. Defective title.
19. Deficient quantity.
20. When the vendor cannot produce title contracted for.
21. Inadequate consideration.
22. Inability to perform.
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24. Incapacity of parties.
25. Gifts and donations.
26. Tender of performance by vendee.
27. Continued — By vendor.
28. Where contract has been rescinded.
29. Verbal abandonment of contract.
30. Though performance be refused, other relief may be granted.
31. Auxiliary remedies — *Ne exeat.*
32. Submissions and awards.

§ 1. **General principles.** Whenever a party to an agreement has been injured by reason of its non-fulfillment by the other party, the most direct and satisfactory remedy that suggests itself, and the one which he instinctively seeks, is specific

performance. This practical result he cannot have at law, for that measures all losses by a money standard of compensation; but equity comes in to supply the more complete justice, and when the circumstances surrounding the transaction are such as bring it within the beneficent rules which time and experience have established, nearly every contract susceptible of substantial enjoyment may be enforced. The enforcement of contracts for the sale and conveyance of land forms one of the most important branches of equity jurisdiction, and constitutes a power which may ordinarily be invoked whenever it is made to appear that a sufficient remedy cannot be afforded by a court of law.[1] The relief is not confined to purchasers, nor to the original parties to the contract, but may be obtained by all in privity with them, whether of blood, law or estate;[2] and on a bill for specific performance the rights of persons not parties to the contract, although vesting after it was made, are proper equitable considerations in adjusting the rights of the parties thereto.[3]

Where specific performance of a contract for the sale of land is decreed the court will, so far as possible, place the parties in the same position they would have been in if the contract had been performed at the time agreed upon; and by the application of the rule of equity by which things which ought to have been done are considered as having been done at the proper time, the vendor is regarded as trustee of the land for the benefit of the purchaser and liable to account to him for the rents and profits, or for the value of the use and occupation, and the purchaser is treated as trustee of the purchase money unpaid and charged with interest thereon, unless the purchase money has been appropriated and no benefit has accrued to him from it.[4] In like manner, where the property has deteriorated because of mismanagement and neglect on the part of the vendor, he is chargeable with the damages so caused.[5]

[1] Barnes v. Barnes, 65 N. C. 261; Smaltz's Appeal, 99 Pa. St. 310.

[2] Cathcart v. Robinson, 5 Pet. (U. S.) 254; Watts v. Waddle, 6 Pet (U. S.) 389; Bird v. Hall, 30 Mich. 374; Ewins v. Gordon, 49 N. H. 444; Tiernan v. Roland, 27 Pa. St. 429; McMorris v. Crawford, 15 Ala. 271; Fitzhugh v. Smith, 62 Ill. 486; Gregg v. Hamilton, 12 Kan. 333.

[3] Curran v. Holyoke, etc. Co. 116 Mass. 90.

[4] Bostwick v. Beach, 105 N. Y. 661.

[5] Worrall v. Munn, 38 N. Y. 137.

The subject of the memorandum of the contract, its requisites and details, have been fully considered in other parts of this work, and, to avoid unnecessary repetition, the following paragraphs will be confined to such phases of the remedy as have not been treated elsewhere.

§ 2. **What contracts may be enforced.** The jurisdiction of equity in specific performance, it is said, proceeds on the supposition that the parties have not only agreed, as between themselves, upon every material matter, but that the matters so agreed upon are of such a nature, and the subjects of enforcement so delineated or indicated, either directly or by reference to something else, or so raised to view by legitimate implication, that the court may collect and place in their proper relations all the essential elements and proceed intelligently and practically in carrying into execution the very things agreed upon and standing to be performed. And if the things to be performed are in their nature incapable of execution by the court, or if needful specifications are omitted, or if material matters are left by the parties so obscure or undefined, or so in want of details, or if the subjects of the agreement are so conflicting or incongruous, that the court cannot say whether or not the minds of the parties met upon all the essential particulars; or if they did, then cannot say exactly upon what substantial terms they agreed or trace out any practical line where their minds met, the case is not one for specific performance.[1] In order, therefore, to induce a court of equity to enforce a contract specifically, it must have been entered into without misapprehension, misrepresentation or oppression,[2] and by parties competent to contract;[3] it must be lawful in its character,[4] reasonable, fair and just;[5] it must be founded on a good consideration,[6] and its terms must be certain and well

[1] Blanchard v. R. R. Co. 31 Mich. 44; Ralls v. Ralls, 82 Ill. 243.

[2] Fish v. Lessor, 69 Ill. 394, Taylor v. Merrill, 55 Ill. 52; Nellis v. Clark, 20 Wend. (N. Y.) 24; Fuller v. Perkins, 7 Ohio, 196; Snell v. Mitchell, 65 Me. 48; Brady's Appeal, 66 Pa. St. 277.

[3] Johnson v. Dodge, 17 Ill. 433.

[4] McClurken v. Detrich, 33 Ill. 349; Hooker v. De Palos, 28 Ohio St. 251.

[5] Bowman v. Cunningham, 78 Ill. 48; Wistar's Appeal, 80 Pa. St. 484; Wells v. Millett, 23 Wis. 64; Crane v. De Camp, 21 N. J. Eq. 414.

[6] Stone v. Pratt, 25 Ill. 25; Smith v. Wood, 12 Wis. 382; Eastman v. Plummer, 46 N. H. 464; Bissell v. Heyward, 96 U. S. 580.

defined.[1] Yet it is not every contract that will be thus enforced, even though fairly and honorably made;[2] nor is either party entitled to a decree of specific performance as a matter of legal right.[3] Every case depends largely upon its own attendant circumstances,[4] and rests in a great measure upon the sound discretion of the court,[5] which grants or withholds relief as the equities of the matter may seem to require.[6] This discretion, however, is not exercised arbitrarily or capriciously, but in conformity with fixed rules and well-recognized principles and within certain well-defined limits. Its object is the attainment of substantial justice; and when the nature of the contract and circumstances of the case present no objection, it is almost as much a matter of course for a court of equity to decree a specific performance as for a court of law to give damages for a breach of it.[7]

As a general rule, therefore, a specific performance of a contract will be decreed when it is apparent, from a view of all the circumstances of the case, that it will subserve the ends of justice; and it will be withheld when, from a like view, it appears it will produce hardship or injustice to either of the parties.[8]

It is a serious objection to the exercise of the extraordinary jurisdiction of equity where neither the allegations nor evidence show that the complainant would be in a worse po-

[1] Potts v. Whitehead, 20 N. J. Eq. 55; Shelton v. Church, 10 Miss. 774; Andrews v. Andrews, 28 Ala. 432; Tiernan v. Gibney, 24 Wis. 190.

[2] Lear v. Chouteau, 23 Ill. 39. This rule is applied with more than ordinary stringency against assignees and representatives of the contracting parties. Odell v. Morin, 5 Oreg. 96.

[3] Beach v. Dyer, 93 Ill. 295; Race v. Weston, 86 Ill. 91; McComas v. Eastley, 21 Gratt. (Va.) 23; Sherman v. Wright, 49 N. Y. 277; Plummer v. Keppler, 26 N. J. Eq. 481.

[4] Allen v. Woodruff, 96 Ill. 11; Fish v. Lightner, 44 Mo. 268; Hudson v. King, 2 Heisk. (Tenn.) 560.

[5] Alexander v. Hoffman, 70 Ill. 114. Especially is this the case where the interests of infants are concerned. Sherman v. Wright, 49 N. Y. 227.

[6] Aston v. Robinson, 49 Miss. 348; Quinn v. Roath, 37 Conn. 16; Eastman v. Plummer, 46 N. H. 464; Allen v. Woodruff, 96 Ill. 11; Jackson v. Ashton, 11 Pet. (U. S.) 229; Port Clinton R'y Co. v. R'y Co. 13 Ohio St. 549; Thurston v. Arnold, 43 Iowa, 41.

[7] St. Paul, etc. v. Brown, 9 Minn. 151; King v. Hamilton, 4 Pet. (U. S.) 311; Papplein v. Foley, 61 Md. 381.

[8] C. B. & Q. R. R. Co. v. Reno, 113 Ill. 39; Fish v. Lightner, 44 Mo. 268; Snell v. Mitchell, 65 Me. 48; Wistar's Appeal, 80 Pa. St. 484; Ellicott v. White, 43 Md. 145.

sition if he should bring his action at law to recover damages for a breach of the agreement; and it has been held that, where the value of the land sought to be conveyed is so small as to amount to but little more than the usual costs of an undefended suit in chancery, specific performance will be denied unless there are some special circumstances showing that the property has a special value to the complainant. Cases may be conceived where small lots of land, of little value to others, might be so located as to be an important possession to the purchaser, and in such a case his claim for a conveyance would be based on his equity to have it, because no other adequate relief could be given him. But where a defendant would practically lose the whole purchase price of his land in costs, and the complainant be in no better position than if he had pursued a less expensive remedy at law, there being no special cause shown for the prosecution of the suit in equity, courts may deny the relief sought in a bill for specific performance.[1]

A court of equity will not decree a specific performance of a contract where the relief sought is not established by clear and convincing proof;[2] nor unless the complainant can show that he has performed it in all its parts, or can show a just excuse for non-performance. The burden of proof is on the complainant to show his right to the relief he seeks by a clear preponderance of the evidence.[3] So also a specific performance will not be decreed against one party in favor of another who has disregarded his own reciprocal obligations in the matter;[4] nor where the duties to be fulfilled by the grantee are continuous, and involve the exercise of skill, personal labor, or cultivated judgment.

§ 3. Can only be of ascertained and existing contract. Specific performance, as an equitable remedy, is based upon the existence of a contract between the parties to the suit or between those through whom they claim;[5] the existence of such a contract is, therefore, the vital and dominating principle involved in the action. Where it is certain, definite and clearly proved the remedy applies; where it is vague, uncer-

[1] Blake v. Flatley, 44 N. J. Eq. 228.
[2] Fleischman v. Moore, 79 Ill. 539.
[3] Brink v. Steadman, 70 Ill. 241.
[4] Marble Co. v. Ripley, 10 Wall. (U. S.) 339.
[5] Stock Yards v. Ferry Co. 112 Ill. 384.

tain, or not clearly proved,[1] or where it has been settled by a prior action at law that no such contract was ever made, and that the acts done and claimed as in pursuance were under a mere license, specific performance will not be decreed.[2] So also where the essential terms of the contract are left in doubt, whether through fraud, mistake or want of skill on the part of the draughtsman, or if, through any of these agencies, it does not truly embody the agreement of the parties, equity will decline to interfere, and will leave the parties to such redress as can be obtained in an action at law.[3]

A court of equity, in considering a bill for specific performance, will not look to the form of the contract, but rather to the substance. It will regard a bond conditioned for the conveyance of land the same as an article of agreement for the sale and purchase of the same, and will decree a specific performance of the condition, which will be treated as the agreement of the parties.[4]

§ 4. The parties. On a bill for specific performance the parties to the contract are necessary parties to the suit;[5] and as a general rule, subject to some exceptions, they alone are the necessary parties.[6] Where the action is brought by the vendee, if the vendor is dead the proceeding may be against the heirs alone,[7] though it would seem that under the statute in some states the executor or administrator may also be joined;[8] while in some instances it has been held that the personal representatives of the deceased vendor are not only proper but necessary parties.[9] Where, however, the vendor has entered into a new contract for the sale of the same land, the second vendee has been held a necessary party defendant to an action on the first contract,[10] and if the vendor has made a general

[1] Danforth v. Perry, 20 Ill. App. 130; Potts v. Whitehead, 20 N. J. Eq. 55; Wistar's Appeal, 80 Pa. St. 484.

[2] Stock Yards v. Ferry Co. 112 Ill. 130.

[3] Snell v. Mitchell, 65 Me. 48.

[4] Robinson v. Appleton, 124 Ill. 276.

[5] It would seem that the court, in its discretion, where good reason is disclosed in the bill, may dispense with a proper party. See Gilham v. Cairns, Breese (Ill.), *124.

[6] Gibbs v. Blackwell, 37 Ill. 191.

[7] Moore v. Burrows, 34 Barb. (N. Y.) 173; Watson v. Mahan, 20 Ind. 223.

[8] Judd v. Mosley, 30 Iowa, 423.

[9] Hill v. Proctor, 10 W. Va. 59.

[10] Fullerton v. McCurdy, 4 Lans. (N. Y.) 132.

assignment for creditors the assignee must be included in a bill for specific performance.[1]

Persons buying from the purchaser are not necessary, though they are proper, parties to a bill brought by the vendor for a specific performance.[2] It must be remembered, however, that while the assignee of a contract will have the right or option of completing the same, and thereupon to insist upon a conveyance to himself, yet the vendor cannot compel him to perform, for the reason that there is no contract between them. The vendor in such case must enforce the contract against the original vendee.[3]

§ 5. **Agents.** It is erroneous to make a mere agent a party to a suit for the specific performance of a contract; and if he is made a party, the complainant will not be entitled even to a decree for costs against him, although he suffers the bill to be taken as confessed for want of answer.[4]

§ 6. **Subsequent purchasers.** A purchaser of real estate with notice of a prior contract to convey the same to a third party takes the estate incumbered with the equitable right of the original contractor to a completion of his bargain.[5] In such event, upon a bill filed by the vendee against the vendor and such subsequent purchaser, the proper decree is to direct a specific performance of the contract by the subsequent purchaser, in whom the legal title is vested, so as to give to the complainant the land itself with the improvements, if any, which he has made thereon, upon his paying the sum originally agreed to be paid by him with interest. And, it seems, it is erroneous in such case to decree a compensation in damages to the complainant for the non-performance of the contract.[6]

[1] Swepson v. Rouse, 65 N. C. 34.

[2] Rose v. Swann, 56 Ill. 37. The vendor in a contract for the sale of land is not required to hunt up the assignees of his vendee to tender a deed. It is sufficient if he tenders it to the vendee; and if the contract is assigned it is the duty of the assignees to make demand of the vendor for a conveyance within a reasonable time, and if they fail so to do they will not be entitled to the aid of a court of equity to enforce specific performance. Hedenberg v. Jones, 73 Ill. 149.

[3] Corbus v. Teed, 69 Ill. 205.

[4] Boyd v. Vanderkemp, 1 Barb. Ch. (N. Y.) 273.

[5] Whitehorn v. Cranz, 20 Neb. 398.

[6] Boyd v. Vanderkemp, 1 Barb. Ch. (N. Y.) 273.

§ 7. **When minors are interested.** Where a contract for the purchase and sale of land has been made by parties competent to contract, and before performance the vendee dies, leaving minor heirs, upon a bill filed against the administrator and guardian of the heirs asking for specific performance or rescission, the court should act for the best interests of the heirs; and if a rescission of the contract would best promote their interests, a decree to that effect should be entered. If, on the other hand, it would best promote the interest of the heirs, and the guardian has sufficient funds, the court should order him to pay the balance of the purchase money and take a deed to the heirs, or the court should order that the interest of the heirs in the contract be offered for sale, and if it brought more than the sum the heirs would have to pay, that it be sold, and if not, then that the contract be rescinded.[1] But in such case where the personal estate of the deceased is not sufficient to pay the purchase money, and the vendor insists on a specific performance, the court will order the unconditional sale of the interest of the heirs in the contract.[2]

§ 8. **Jurisdiction — Land in another state.** It has long been the established law that in cases of contract, trust or fraud the equity courts of one state having jurisdiction of the parties are competent to entertain a suit for specific performance, or to establish a trust, or for a conveyance, although the contract, trust or fraudulent title pertains to lands in another state.[3] The principle upon which this jurisdiction rests is said to be that chancery acting *in personam* and not *in rem* holds the conscience of the parties bound without regard to the *situs* of the property, while the jurisdiction itself arises whenever a special equity can be shown which forms a ground for compelling a party to convey or release, or for restraining him from asserting a title or right in lands so situated.[4] The jurisdiction, however, is strictly limited to those cases in which the relief decreed can be obtained through the party's personal

[1] Greenbaum v. Austrian, 70 Ill. 591.

[2] Greenbaum v. Austrian, 70 Ill. 591.

[3] Actions upon contract have always been regarded as transitory, and it seems are equally so whether they relate to real or personal property.

[4] Davis v. Parker, 14 Allen (Mass.), 94; Bailey v. Ryder, 10 N. Y. 363.

obedience; for if it went beyond that the assumption of jurisdiction would not only be presumptuous but ineffectual.

The rule is inflexible that the courts of one state are without jurisdiction over title to lands in another state; and it has repeatedly been held that the clause of the federal constitution which requires full faith and credit to be given in each state to the records and judicial proceedings of every other state is subordinate to this rule, and applies to the records and proceedings of courts only so far as they have jurisdiction.[1] Hence, where a court has no jurisdiction over title to lands in another state, its decree, though conclusive within the jurisdiction which pronounced it, cannot be allowed to affect the title to those lands. Such a decree, therefore, could have no greater effect than to impose a mere personal obligation enforceable by injunction, attachment or like process against the person, but could not operate upon lands in another jurisdiction to create, transfer or vest title.[2]

But within the conditions as first mentioned, courts of equity will, where the proper parties are within the territorial sovereignty or within reach of the territorial process, administer full relief, notwithstanding that the property in controversy is actually situated in a foreign jurisdiction; and although they cannot bind the land itself by the decree, yet they can bind the conscience of the party in regard to the land, and compel him to perform his agreement according to conscience and good faith.[3]

Where the defendant in such a suit is an infant,[4] the proper decree is that he convey the legal title to the premises when he arrives at the proper age to enable him to do so, according to the laws of the state where the property is situated; and that in the meantime the vendee be permitted to receive and retain the possession of the property.[5]

[1] Watts v. Waddle, 6 Pet. (U. S.) 389; Brine v. Ins. Co. 96 U. S. 627; Davis v. Headley, 22 N. J. Eq. 115.

[2] Massie v. Watts, 6 Cranch (U. S.), 148; Wood v. Warner, 15 N. J. Eq. 81; Davis v. Headley, 22 N. J. Eq. 115.

[3] Sutphen v. Fowler, 9 Paige (N. Y.), 280; Massie v. Watts, 6 Cranch (U. S.), 148; Gardner v. Ogden, 22 N. Y. 339; Brown v. Desmond, 100 Mass. 267.

[4] As where the suit is brought by vendee against infant heir at law of vendor.

[5] Sutphen v. Fowler, 9 Paige (N. Y.), 280.

§ 9. **As dependent on conditions.** As to the power of the vendor or of the purchaser to make the performance of a condition precedent essential to the vesting of a legal or equitable right in the adverse party to a specific performance, there remains no doubt; and while courts of equity will sometimes relieve against a forfeiture where it would be unconscientious to insist upon a strict and literal compliance, yet where the parties make the performance of the condition an essential ingredient of the contract the complainant may lose his rights thereunder by not performing by the stipulated day. This is not only the rule where the stipulations allude to nothing more than money payments, but is frequently the case where the contract provides for the erection of buildings or other substantial improvements to be made by a certain specified day. In every case of this kind where, either by express terms or just implication, time is an essential part of the contract, the performance of the condition by the day named is a material circumstance, and a failure to comply within the time releases the other party from any obligation thereunder; and unless the party so in default can furnish some legal excuse for his delinquency he will not thereafter be entitled to a decree for specific performance.[1]

§ 10. **Mutuality — Unilateral contracts.** Among the fundamental rules governing the exercise of the jurisdiction of equity in matters of agreements and claims for specific performance is the general proposition that to specifically enforce a contract there must be mutuality of obligation unless the consideration is executed, and that where a contract was intended to bind both parties, and for any reason one of them

[1] As where a contract for a city lot contained a provision that the purchaser should, on or before a particular day specified, build and inclose a house upon the front of the lot, or that in lieu thereof he should on that day pay to the vendor $1,000 as the first payment towards the purchase money, and the contract further provided that if the vendee neglected or failed to perform any of the covenants therein contained at the times limited for that purpose all his right in the premises should cease, *held*, that the parties had made the payment at the day an essential part of the contract; and that the vendee, who had not attempted to build the house upon the lot, and who had without any legal excuse failed to make the payment at the time specified, was not entitled to a decree for a specific performance of the contract. Wells v. Smith, 7 Paige (N. Y.), 22; and see Grigg v. Landis, 21 N. J. Eq. 505.

is not bound, he cannot compel performance by the other.[1] Hence it is that unilateral or optional contracts are not favored in equity, and the want of mutuality of obligation and remedy may generally be urged as a bar to their specific enforcement.

This doctrine, however, does not apply to contracts unilateral in form but bilateral in effect, as contracts of this character in the form of bonds and similar obligations are constantly enforced;[2] and while the general rule undoubtedly is that equity will not specifically enforce the performance of a contract where, from its terms, a right does not arise in favor of either party against the other, and where either party is not entitled to the equitable remedy of specific execution of such obligation against the other contracting party, yet this rule is subject to the modification that if the quality originally lacking should be subsequently supplied, the enforcement of the contract may be made possible. The rule, therefore, may be said to obtain to this extent: that equity will not direct a performance of the terms of the agreement of one party when, at the time of such order, the other party is at liberty to reject the obligations of such agreement; yet, as in a case where an agreement which the statute of frauds requires to be in writing has been signed by one of the parties only, or when the contract, by its terms, gives to one party a right to the performance which he does not confer upon the other,[3] upon the filing of a bill for enforcement in equity by the party who was before unbound, he thereby puts himself under the obligation of the contract. The contract then ceases to be unilateral; for by his own act the unbound party makes the contract mutual, and the other party is enabled to enforce it.

§ 11. **Indefiniteness — Uncertainty.** Certainty in every essential particular, whether of terms or description, is indispensable to the specific enforcement of agreements.[4] This is one of the best-settled rules, and, as a general statement, stands

[1] Justice v. Lang, 42 N. Y. 509; Reese v. Reese, 41 Md. 554; Meason v. Kaine, 63 Pa. St. 335; Maynard v. Brown, 41 Mich. 298; Butman v. Porter, 100 Mass. 337.

[2] Jones v. Robbins, 29 Me. 351; Ewins v. Gordon, 49 N. H. 444; Barnard v. Lee, 97 Mass. 92.

[3] An example is afforded in the instance of a lease for years which gives an option to the lessee of purchasing during the term.

[4] Sales v. Hickman, 20 Pa. St. 180; Hamilton v. Harvey, 121 Ill. 469; Odell v. Morin, 5 Oreg. 96; Miller v. Campbell, 52 Ind. 125.

unquestioned. A review of the decided cases, however, shows that courts have in many instances been extremely liberal in the application of the rule, and by favorable constructions greatly lessened its restrictive character. This is particularly true in regard to descriptions. The English cases, probably from the different system of land-parceling which prevails in Great Britain, are very noticeable in this respect; and many American courts, following the precedents thus set, have gone to extremes, which, in the light of contemporary cases, seem almost unwarrantable.[1]

The general rule, however, is that the terms must be well defined, and the description of the subject-matter so certain that it may be known therefrom what the purchaser was contracting for and the vendor was selling. If the description of the land to be conveyed is so indefinite and uncertain that there cannot be determined from the memorandum its location, size, shape, etc.; or if, without a resort to parol evidence, it would be impossible to ascertain the subject of the agreement, no enforcement of the contract can be had.[2] Where a

[1] Upon the principle that words of description in a contract for conveyance are presumed to relate to an estate owned by the vendor, property described as "a house and lot of land situated on Amity street, Lynn, Mass.," has been held sufficient. Hurley v. Brown, 98 Mass. 545. And so "a house on Fifth street, between D. and E. streets." Scanlan v. Geddes, 112 Mass. 15. And see Mead v. Parker, 115 Mass. 413. Descriptions by designation also have been suffered to have effect notwithstanding an apparent indefiniteness, as "The Fleming farm on French creek." Ross v. Baker, 72 Pa. St. 186. Agreements for the sale of premises to be afterwards designated by the parties have been held enforceable. Ellis v. Burden, 1 Ala. 458; Washburn v. Fletcher, 42 Wis. 152; Simpson v. Breckenridge, 32 Pa. St. 287. And see examples given on page 147.

[2] Performance was refused where the land was described as "a tract of land lying on the north side of the Waterbury Branch, in the county of ——, state of ——, containing one hundred and fifty acres." Copps v. Holt, 5 Jones' Eq. (N. C.) 153. And so of "a lot of land joining a small tract now occupied by Michael Micue." Jordan v. Fay, 40 Me. 130. "The houses on Smithfield street." Hammer v. McEldowney, 46 Pa. St. 334. In Murdock v. Anderson, 4 Jones' Eq. (N. C.) 77, a decree for conveyance was refused where the receipt described "one house and lot in the town of Hillsborough, purchased of me," etc. In Miller v. Campbell, 52 Ind. 125, the contract described certain land as "the one hundred and twenty acres of land in Shannon county, Missouri." In Lynes v. Hayden, 119 Mass. 482, there was an agreement to convey "from twenty-six thousand to twenty-eight thousand feet of land situate on

sufficient description is given, parol evidence may be resorted to in order to fit the description to the thing; but courts of equity will not ordinarily entertain bills for the specific execution of contracts with variations or additions, or new terms to be made and introduced into them by parol.[1]

A court of equity will not decree specific performance where it is not clear from the evidence that the exact terms thereof were agreed upon and understood,[2] or where it appears that any part thereof still remains in negotiation.[3] Nor will the action lie where the consideration involves matters which are imperfectly and indefinitely expressed, as where the consideration named is that the purchaser shall erect on the land "a certain building" without any further description.[4]

Walden street and Vassal lane, in Cambridge, when the bounds are fixed and the street laid out, the street to be forty feet wide and two hundred feet long." Gray, C. J., said: "The agreement signed by the intestate describes the boundaries of the land by the adjoining streets on the northeast and northwest only, and looks to the fixing of bounds and the laying out of another street before conveyance. The report finds that the bounds were not fixed nor the location of the proposed street determined in his life-time. The agreement is too indefinite to be specifically enforced." In Carr v. Passaic, etc. Building Co. 19 N. J. Eq. 424, the resolution of the company was that two acres be sold." Held to be upon its face vague and uncertain. The court there say: "The vagueness and uncertainty is patent, and no parol proof can be admitted to explain it." A written contract for the sale of "two lots of land situate in Hackensack township, in the county of Bergen," was, in King v. Ruckman, 20 N. J. Eq. 316, held to be uncertain and insufficient. And see Nicols v. Williams, 22 N. J. Eq. 63; Bowman v. Cunningham, 78 Ill. 48.

[1] Hammer v. McEldowney, 46 Pa. St. 334.

[2] Bowman v. Cunningham, 78 Ill. 48. A written agreement to convey land "for $25,000, and mortgage to remain at five per cent. for five years," *held* not to be a sufficient memorandum of sale to be specifically enforced in equity. Grace v. Denison, 114 Mass. 16.

[3] Where there was a written offer to convey land within a time fixed, at a price named, of which a portion was to be paid on the delivery of deed, the balance to be secured by mortgage, but with no time fixed for payment, *held*, that the want of designation of any time when the great bulk of the consideration was to be paid left a material part of the contract to be settled by negotiation; and hence, even if such offer had been accepted, a decree for specific performance would not be made. Potts v. Whitehead, 20 N. J. Eq. 55.

[4] Mastin v. Halley, 61 Mo. 196. The consideration is not mutual, and by reason of its uncertainty the contract cannot be performed. Nor will equity enforce a building contract. Ibid.

A contract for the sale of land, although obscure in its description and terms, may notwithstanding be enforced whenever, from the entire instrument and the attendant circumstances, the intention of the parties can be ascertained.[1]

§ 12. **Fraud.** To entitle a party to relief in equity he must come into court with clean hands and a cause that appeals to good conscience.[2] Hence, equity will never decree the specific performance of a contract induced by or founded in fraud,[3] or into which fraud has entered,[4] or when wrong or injustice would be inflicted on the parties or others.[5]

A party is considered guilty of fraud when he induces the contract by wilful misstatements of material facts, or when he conceals from the other some fact which is material, which is within his own knowledge, and which it is his duty to disclose.[6] This will include all representations or concealments which materially affect the value of the land, or its adaptability for the purposes required.

It has been asserted as a general rule that, in order to defeat a suit for specific performance on the ground of fraud, it is necessary that the fraud should be productive of injury;[7] but this rule has frequently been denied. Even if the rule be admitted it would yet seem that fraud in obtaining a contract may be sufficient to defeat the right to compel a specific performance thereof, although the fraud was not productive of injury to the defendant; it is sufficient that such injury would result to third persons.[8] The more general rule would seem

[1] White v. Herman, 51 Ill. 243.

[2] Taylor v. Merrill, 55 Ill. 52; Crane v. De Camp, 21 N. J. Eq. 414; Brady's Appeal, 66 Pa. St. 277.

[3] Johnson v. Dodge, 17 Ill. 433.

[4] Tamm v. Luvelle, 92 Ill. 263.

[5] Brady's Appeal, 66 Pa. St. 277.

[6] Laidlaw v. Organ, 2 Wheat. (U. S.) 195; Brown v. Montgomery, 20 N. Y. 287; Bank v. Baxter, 31 Vt. 101; Roseman v. Canovan, 43 Cal. 110; Emmons v. Moore, 85 Ill. 304.

[7] Scott v. Skinner, 27 N. J. Eq. 185. Thus, a misrepresentation to the purchaser of land to the effect that an alley on the premises was only a private right of way in a few persons, when in fact the alley was a public one, is not such a misrepresentation as will bar a specific performance, the rights in the property in either case being substantially the same. Wuesthoff v. Seymour, 22 N. J. Eq. 66. The doctrine was announced in Morrison v. Lods, 39 Cal. 38, but subsequently overruled.

[8] As where one by fraudulent representations procured a contract for the sale of lands to himself, which contract, but for such representations, would have been given to another. Kelly v. R. R. Co. 74 Cal. 557.

to be that a court will not make itself an instrument to carry out fraud, whether the person to be injured be a party to the contract or not. Nor is it absolutely necessary, in order to defeat such suit, that the fraud must be productive of damage either to the defendant or to third persons. If the facts relied on show deception, as where misrepresentations were intentionally made for the purpose of deceiving the defendant, and he relied upon and was deceived by the same, and thereby was induced to enter into a contract, which, but for the fact of such deception, he would not have done, a court of equity will relieve against the contract and refuse to enforce the same, whether it be accompanied by damage or not.[1]

It is not necessary to establish fraud or imposition with the same degree of certainty, in order to defeat a claim for specific performance, that is requisite on these grounds to defeat a recovery at law on the instrument,[2] while it has frequently been held that the rules that obtain in actions for rescission are not to be permitted to have the same application where the suit is brought for enforcement. Indeed, it is well settled that a court of equity may refuse specific performance of a contract which it would not set aside,[3] and that while a court will refuse to destroy a contract it will not further in any way a fraudulent design. Hence, so far as suits of this character are concerned, a misrepresentation, if material, will be sufficient to bar the remedy of specific enforcement, although not accompanied by damage.

§ 13. **Contract induced by misrepresentation.** Specific enforcement can only be had of contracts fairly and understandingly entered into, uninfluenced by misstatement of facts or misrepresentation of the nature, character, situation, extent or quality of the estate which forms the subject-matter of the contract. But to constitute a misrepresentation which will prevent a decree for specific performance, the statement in question must be so material to the contract built upon it that, if the statement be false, the contract becomes one which it would be unconscionable for the party who made the state-

[1] Kelly v. R. R. Co. 74 Cal. 557, overruling Morrison v. Lods, 39 Cal. 385.

[2] Race v. Weston, 86 Ill. 91.

[3] Clement v. Reid, 17 Miss. 542; Taylor v. Merrill, 55 Ill. 61; Jackson v. Ashton, 11 Pet. (U. S.) 248.

ment to enforce;[1] and, for the reason that the party thus deceived does not get the thing which he had contracted for, equity will refuse its aid to carry out the terms of the bargain.[2]

§ 14. Concealment of material facts. As has been shown, the vendor is in duty bound to disclose to the purchaser all of the incidents to which the property is subject, and concerning which he has made inquiries, or of which he is in ignorance and has not an equal opportunity of ascertaining, while under certain conditions the same duty devolves on the vendee. This doctrine has always been strongly asserted in actions for specific performance; and where either party, by accident or design, has concealed facts upon which the contract was based, and which, if known, would have prevented the making of the agreement, they cannot be heard to ask enforcement against the other party. Indeed, the concealment by either party of some material fact which is within his own knowledge, and which it is his duty to disclose, is sufficient to constitute an actual fraud, and to deprive the guilty party of all right to ask relief in equity.[3]

It has been held that no duty rests upon the vendee to disclose facts within his knowledge advantageous to the vendor — facts which, if made known, would tend to enhance the value of the property or induce the vendor to ask a higher price therefor; and that, being under no duty to reveal the same, a failure to disclose would not be a fraudulent concealment.[4] To a limited extent this is probably true, but the general tendency of authority is to the contrary; and where such concealment is wilfully made despite the inquiries of the vendor, the rule as first stated would certainly apply. When such latter doctrine is permitted to obtain there are generally qualifying circumstances, and it is allowed efficacy usually only in cases of rescission; and while the mere concealment by one party of a material fact affecting the value of the property sold, known

[1] Scott v. Shiner, 27 N. J. Eq. 185.

[2] Wiswell v. Hall, 3 Paige (N. Y.), 313.

[3] King v. Knapp, 59 N. Y. 462; Nichols v. Michael, 23 N. Y. 264; Bank v. Baxter, 31 Vt. 101; Holmes' Appeal, 77 Pa. St. 50; Connelly v. Fisher, 3 Tenn. Ch. 382; Emmons v. Moore, 85 Ill. 304; Hanson v. Edgerly, 29 N. H. 343.

[4] Harris v. Tyson, 24 Pa. 347; Williams v. Spurr, 24 Mich. 335; Law v. Grant, 37 Wis. 548.

to him, and of which the other party was ignorant, may not be such a fraud as would avoid the contract, yet it will generally be sufficient to induce a court of equity to withdraw its aid in the specific enforcement of the contract thus obtained, and the parties will be left to their remedy at law.[1]

§ 15. **Hardship- Oppression.** While it is a general rule that specific performance will always be decreed when all the circumstances show that it will subserve the ends of justice, it is also a principle of equity not to lend its aid to enforce the execution of a contract when the result will be to impose great hardship or work injustice upon either of the parties to it. A court of equity must be satisfied that the claim for specific enforcement is fair, just and reasonable, and the contract equal in all its parts, before it will interpose with this extraordinary assistance; and if there be any well-founded objection on any of these grounds, the practice is to leave the party to his remedy at law for a compensation in damages.[2] It is the unrestrained mutual assent of the parties that furnishes the primary element of obligation upon which a contract may be enforced, and where assent is obtained only through oppression or overpowering intimidation the contract may be declared void on an appeal to either a court of law or equity to enforce it; nor will equity enforce a contract against one who, although acting voluntarily, yet in fact appears to have executed the contract with a mind so subdued by harshness, cruelty, extreme distress, or apprehensions short of legal duress, as to overpower and control the will.[3]

But while this principle is everywhere received and allowed a controlling efficacy, it is impossible to reduce within the limits of a legal definition or rule the various transactions which may render a contract inequitable. Each case must be judged by its own circumstances, and relief is given or withheld in the discretion of the court. A party who seeks the aid of a court of equity is bound to do justice, and not ask the

[1] Williams v. Beazley, 3 J. J. Marsh. (Ky.) 578; Livingstone v. Iron Co. 2 Paige (N. Y.), 390; King v. Knapp, 59 N. Y. 462.

[2] Seymour v. Delancey, 6 Johns. Ch. (N. Y.) 222; Williams v. Williams, 50 Wis. 317; Bruck v. Trucker, 42 Cal. 346; Burke v. Seeley, 46 Mo. 334.

[3] Bank v. Copeland, 18 Md. 305; Gillett v. Ball, 9 Pa. St. 14; Worcester v. Eaton, 11 Mass. 368.

court to become the instrument of iniquity or oppression in the enforcement of a hard and unconscionable bargain.[1] It is a settled rule, therefore, to allow a defendant in a bill for specific performance to show that it is unreasonable, or unconscientious, or founded in mistake,[2] or other circumstances leading satisfactorily to the conclusion that the granting of the prayer of the bill would be inequitable or unjust.[3] At the same time it must be borne in mind that it is a settled rule of law that contracts are to be interpreted and enforced according to the fair import of their terms, without reference, as a rule, to the hardships that may fall on the parties. If persons voluntarily express themselves in writing, they must be bound by the language they have employed; and the law will presume that they understood the import of their own contracts, and they will be held to have entered into them with knowledge of their mutual rights and obligations.[4]

In the application of the principle that equity will refuse its aid to enforce the execution of a contract when the same is calculated to work oppression or injustice, thus creating great hardship, the question of hardship is ordinarily to be judged of at the time the contract was entered into. If at that time it was fair and just it will be immaterial that it may, by the force of subsequent circumstances or change of events, have become less beneficial to one party, unless these subsequent events have been in some way produced by or are due to the party who seeks performance.

[1] Margrof v. Muir, 57 N. Y. 155; Plummer v. Keppler, 26 N. J. Eq. 481; Fish v. Lesor, 69 Ill. 394.

[2] It is a good defense to a bill in equity, praying for a specific performance of an agreement to convey land, that the defendant was led into a mistake, without any gross laches of his own, by an uncertainty or obscurity in the descriptive part of the agreement, so that the agreement applied to a different subject from that which he understood at the time; or that the bargain was hard, unequal or oppressive, and would operate in a manner different from that which was in the contemplation of the parties when it was executed. But in such case the burden of proof is on the defendant to show such mistake on his part, or some misrepresentation on the part of the plaintiff. Western Railroad v. Babcock, 6 Met. (Mass.) 346.

[3] King v. Hamilton, 4 Pet. (U. S.) 311; Blackwilder v. Loveless, 21 Ala. 371; Stone v. Pratt, 25 Ill. 34; Quinn v. Roath, 37 Conn. 16.

[4] Abbott v. Gatch, 13 Md. 314.

§ 16. Misapprehension — Mistake. It is a fundamental principle that specific performance will not be decreed unless the agreement has been entered into with fairness and without misapprehension of material facts induced by the statements or actions of the other party to the contract.[1] Nor will equity lend its aid where both parties to the contract labor under a mutual mistake in regard to some matter material to the transaction, and where the true intention was different from the contract as reduced to writing.[2] But if a party misconstrue a contract as written, this is a mistake of law and not of fact; and for such mistakes equity can grant no relief. Hence, if it appear that the parties entered into the agreement with a full knowledge of all the facts, but under a misapprehension as to the nature and extent of the agreement as to a matter of law, the general rule is that equity can afford no relief.

But while the general principle remains true that equity relieves only against mistakes of fact and not against mistakes of law, the proposition is not without exception, for equity will and often does relieve against mistakes of law where such mistakes are of such a character as to involve other features which warrant equitable interposition. Thus, where parties have contracted under a mutual mistake of the law or of the legal effect of a law, relief has been granted on the ground of surprise; or if only one party was thus mistaken, while the other contracted with knowledge, and the case involved peculiar hardship, relief has been permitted on the ground of fraud. There, is however, no general rule, and scarcely any well-defined principle, by which these matters shall be gov-

[1] Brady's Appeal, 66 Pa. St. 277; Race v. Weston, 86 Ill. 97.

[2] Colling v. Taylor, 16 Ill. 457. Where it appears that at the time of entering into a contract for the sale of land there was a misunderstanding between the parties as to the identity of the land to which the contract related, a court of equity, in its discretion, ought not to interfere by decreeing a specific performance. Graham v. Hendren, 5 Munf. (Va.) 185. Where a contract was made for the sale of lands, and the vendor gave a bond in which by mistake he agreed to convey more than he had actually sold, the court refused to decree a specific performance of the contract according to the bond. Bickhane v. Gough, 4 H. & McHen. (Md.) 17.

erned. The decisions are often in apparent conflict upon practically the same facts, and varying as the minds of the different chancellors who enunciated them. The strong tendency is directly opposed to the harsh and arbitrary application of the rule that ignorance or misconception of law will not excuse; and where the circumstances of particular cases have furnished elements which are of universal recognition in granting equitable relief, courts in many instances have not failed to employ them. Particularly is this true in respect to actions for specific performance. The discretion of the court is here allowed a wide latitude; and where a mistake is set up and found to be material, if such mistake involves the other elements of fraud, surprise, uncertainty, unfairness and great hardship, or any of the numerous matters that appeal to the conscience of courts, specific enforcement may be denied, notwithstanding such mistake is a mistake of law.[1]

§ 17. **Laches and delay.** While time is a component part of every contract, it is the general rule of equity that it is not of the essence in a contract for the sale of lands, in the absence of a special stipulation making it so;[2] and the failure of either party to perform his contract on the designated day does not of itself deprive him of the right to a specific performance subsequently, if he is then able to comply with his part of the engagement.[3] This rule, however, is usually applied only where some excuse is shown for the delay,[4] and where such

[1] Where a vendor, residing in the state of New York, made a contract for the sale of a quarry in Connecticut, and of personal property valued at $25,000 connected with it, the whole for $55,000, of which $5,000 was paid down, the balance to be secured by a mortgage back, but where he made the agreement under the mistaken belief that a chattel mortgage would be a valid security in Connecticut without a retention of possession by him, and where the purchaser was insolvent, it was held that he was justified in refusing to convey, and that he ought not to be compelled to convey, in the exercise of the discretion of a court of equity. Patterson v. Bloomer, 35 Conn. 57.

[2] Brashier v. Gratz, 6 Wheat. (U. S.) 528; Young v. Daniels, 2 Iowa, 126; Knott v. Stephens, 5 Oreg. 235; Quinn v. Roath, 37 Conn. 16; Steele v. Branch, 40 Cal. 3; Walton v. Wilson, 30 Miss. 576; Snyder v. Spaulding, 57 Ill. 480.

[3] Brashier v. Gratz, 6 Wheat. (U. S.) 528; Laird v. Smith, 44 N. Y. 618; Taylor v. Longworth, 14 Pet. (U. S.) 172; Prince v. Griffin, 27 Iowa, 514; Shafer v. Niver, 9 Mich. 253.

[4] Mix v. Balduc, 78 Ill. 215; McDermid v. McGregor, 21 Minn. 111.

delay has not changed the condition of the parties, nor the value of the property, and the same justice can be done between the parties as when a conveyance was to have been executed.[1] But when, during the delay, the circumstances have so changed that the objects of the party against whom performance is sought can no longer be accomplished; when he who is injured by the failure of the other contracting party cannot be placed in the situation in which he would have stood had the contract been performed; where the lapse of time has been very great, or where the value of the property has materially changed, the laches of the one will excuse performance by the other, and equity, refusing to interfere, will leave the parties to their remedies at law.[2]

Usually, however, where there has been no rescission, or where time is not made material by implication or the avowed objects of the parties, specific performance will be granted.[3] This is particularly true in all cases of partial performance; as where the vendee has gone into and remained in possession,[4] or where a large portion of the purchase price has been paid.[5]

But equity, no less than the law, will not permit parties to sleep on their rights; and it is fundamental that one who seeks the remedy of specific performance, as well as he who desires to maintain an objection founded upon the other's laches, must show himself to have been ready, prompt and eager to perform.[6] If a party who has not complied with the strict terms

[1] Taylor v. Longworth, 14 Pet. (U. S.) 172; Hubbel v. Von Schoening, 49 N. Y. 326.

[2] Brashier v. Gratz, 6 Wheat. (U. S.) 528; De Cordova v. Smith, 9 Tex. 129; Dubois v. Baum, 46 Pa. St. 537; Iglehart v. Vail, 73 Ill. 63; Alexander v. Hoffman, 70 Ill. 114; Haughwout v. Murphy, 21 N. J. Eq. 118. The court may refuse the decree in such cases, even though the statute of limitations has not expired. Peters v. Delaplaine, 49 N. Y. 362.

[3] Farris v. Bennett, 26 Tex. 568; Hanna v. Ratakin, 43 Ill. 462; Duran v. Sage, 11 Wis. 151. Time will not be considered of the essence of the contract, although a time for payment is fixed, if the vendor consents to delay and acquiesces in it. Barsolou v. Newton, 63 Cal. 223; Brock v. Hidy, 13 Ohio St. 305.

[4] Waters v. Travis, 9 Johns. (N. Y.) 450; Stretch v. Schenck, 23 Ind. 77.

[5] McLaughlin v. Shields, 12 Pa. St. 283.

[6] Marshall v. Perry, 90 Ill. 289; Henderson v. Hicks, 58 Cal. 364; Callen v. Ferguson, 29 Pa. St. 247; Walker v. Emerson, 20 Tex. 706; King v. Hamilton, 4 Pet. (U. S.) 311. In the leading case of Benedict v. Lynch, 1 Johns. Ch. (N. Y.) 370, the plaintiff purchased a tract of land

of his contract seeks relief in equity he must make out a case free from all doubt, and show that the relief asked for is, under all the circumstances, equitable, and account for his delay and apparent remission of duty.[1] All contracts, even where time is not of the essence, should be performed or rescinded within a reasonable time; and if there has been unusual delay that cannot be explained consistently with good faith equity will deny relief.[2]

It may be said, however, that there is no universal or general rule, and each case must in a large measure be judged by its own circumstances. A party may not trifle with his contracts and still ask the aid of a court of equity; neither will

and was to pay a certain sum in one year, and the remainder to be paid in one, two and three years, with interest annually. The contract also provided that if the plaintiff failed in the payments or any of them the agreement to be void. The plaintiff took possession of the land and cleared a portion thereof and built a house thereon, but was unable to make his payments as agreed upon. The court refused relief, Chancellor Kent saying "that where the party who applies for a specific performance has omitted to execute his part of the contract by the time appointed for that purpose, without being able to assign any sufficient justification or excuse for his delay, and when there is nothing in the acts or conduct of the other party that amounts to an acquiescence in that delay, the court will not compel a specific performance. The rule appears to be founded in the soundest principles of policy and justice. Its tendency is to uphold good faith and punctuality in dealing." This case has been followed in a number of instances, and specific performance has been refused where little or nothing has been paid by the purchaser. See Wells v. Smith, 7 Paige (N. Y.), 22; Reed v. Breeden, 61 Pa. St. 460; O'Fallon v. Kennerly, 45 Mo. 124; Barnard v. Lee, 97 Mass. 92.

[1] Delevan v. Duncan, 49 N. Y. 485; Hedenberg v. Jones, 73 Ill. 149; Taylor v. Longworth, 14 Pet. (U. S.) 172.

[2] Delay of ten years *held* fatal, Alexander v. Hoffman, 70 Ill. 114; so of five years, Fitch v. Willard, 73 Ill. 92; eleven years, Iglehart v. Vail, 73 Ill. 63. A delay of five months without excuse *held* fatal. Mix v. Balduc, 78 Ill. 215. Where a contract of sale was made in February, 1867, for the consideration of $52,000, one-third to be paid in hand and the balance in two equal annual instalments, and the purchaser paid only $500 down, and did not offer to make the several payments when due, nor file his bill for specific performance until July, 1873, when the property had greatly risen in value. *Held*, that in the absence of excuse the delay in offering to perform and in filing the bill were such that equity could not aid him. Roby v. Cossitt, 78 Ill. 638. See, also, Haughwout v. Murphy, 21 N. J. Eq. 118; Campbell v. Hicks, 19 Ohio St. 433; Howe v. Rogers, 32 Tex. 218; Johns v. Norris, 22 N. J. Eq. 102.

the law be administered in a spirit of technicality and so as to defeat the ends of justice. The principle deducible from the reported cases seems to be that time, in the performance of an agreement either for the sale or purchase of real property, is always material; and a court of equity will not, any more than a court of law, excuse laches and gross negligence in the assertion of a right to a specific performance. On the other hand, time is not of the essence of the contract unless made so by its terms; and, although there may not, when time has not been made essential, be performance at the day, if the delay is excused, and the situation of the parties or of the property is not changed so that injury will result, and the party is reasonably vigilant, equity will relieve him from the consequences of the delay and grant a specific performance.

Where the purchaser of land has an option to avoid the contract for objections to the title, any delay in deciding whether he will accept the same will defeat his right to a specific performance.[1]

§ 18. Defective title. In the absence of an express stipulation as to the character of the title to be conveyed, a marketable title is always presumed,[2] while the rule is fundamental that the purchaser will never be compelled to accept a doubtful title,[3] or one which can only be settled by litigation,[4] or where the purchase would expose him to the hazard thereof;[5]

[1] Where the purchase of land is made upon condition that the title is found good, the purchaser is only entitled to a reasonable time in which to determine whether he will take the title the vendor has or reject it. He cannot keep the contract open indefinitely, so as to avail of a rise in the value of the property or relieve himself in case of a depreciation. Hoyt v. Tuxbury, 70 Ill. 331. Where, by a contract for the sale of lots, the vendee was to satisfy himself as to the title and make payment within two weeks, but failed to do so, and more than a year afterwards tendered the purchase money and demanded conveyance, *held*, that he was guilty of laches and was not entitled to a conveyance. Lanitz v. King, 6 S. W. Rep. (Mo.) 263.

[2] Powell v. Conant, 33 Mich. 396; Freetly v. Barnhart, 51 Pa. St. 279; Taylor v. Williams, 45 Mo. 80.

[3] Ludlow v. O'Neil, 29 Ohio St. 182; Richmond v. Gray, 3 Allen (Mass.), 27; Jeffries v. Jeffries, 117 Mass. 184; Griffin v. Cunningham, 19 Gratt. (Va.) 571; Gill v. Wells, 59 Md. 492; Powell v. Conant, 33 Mich. 396; Vreeland v. Blauvelt, 23 N. J. Eq. 483; Taylor v. Williams, 45 Mo. 80; Pratt v. Erby, 67 Pa. St. 396; Littlefield v. Tinsley, 26 Tex. 353; Linhous v. Cooper, 2 W. Va. 57.

[4] Butts v. Andrews, 136 Mass. 221; Charleston v. Blohme, 15 S. C. 124.

[5] Dobbs v. Norcross, 24 N. J. Eq.

in other words, it is the undoubted right of the purchaser to demand a clear title to the bargained property, and the correlative duty of providing the same is imposed upon the vendor.[1] The terms of the contract of sale exercise an important influence upon the application of the rule, however, and in many instances will determine the question of title when raised.

Ordinarily, where a vendor who sues to enforce the contract alleges that he is able, ready and willing to convey the title and tenders a deed, the purchaser must either aver that the vendor has no title, or, if the title is defective, must point out the defects that they may be remedied or the contract rescinded;[2] and while a purchaser will not be compelled to accept a title palpably defective, he cannot justify his refusal to accept by mere captious objections; nor is it sufficient for him, when the jurisdiction of a court is invoked to compel him to perform, merely to raise a doubt. A defect in a record title will, under most circumstances, furnish a defense to a purchaser, particularly where it affects the value of the property or would interfere with its sale, and thus render it unmarketable;[3] but there is no inflexible rule, in the absence of express stipulations, that a vendor must furnish a perfect title of record, and it has frequently been held that defects in the record or paper title may be removed by parol evidence.[4] Where, however, the title depends upon a matter of fact which is not capable of satisfactory proof, or, if capable of that proof, is yet not so proved, the title is not marketable, and the purchaser is under no obligation to take it.[5]

An adverse title acquired by prescriptive user is not for that

327; Jeffries v. Jeffries, 117 Mass. 184; Cornell v. Andrews, 35 N. J. Eq. 7; Walsh v. Barton, 24 Ohio St. 248.

[1] Middleton v. Selby, 19 W. Va. 167; Herzberg v. Irwin, 92 Pa. St. 48. The writer, in his recent work on Abstracts, in answering the question, What constitutes a good and valid title? says: "The title disclosed should extend to show a full and perfect right of property and present possession vested in the vendor. It must also embrace the entire estate or interest sold, and be free from the lien of all burdens, charges or incumbrances, and should not only be free from litigation but from palpable defects and grave doubts. It should consist of both the legal and equitable titles, and be fairly deducible of record." Warvelle on Abstracts of Title, 547.

[2] Logan v. Bull, 78 Ky. 607.

[3] Shriver v. Shriver, 86 N. Y. 576.

[4] Hellreigel v. Manning, 97 N. Y. 56.

[5] Shriver v. Shriver, 86 N. Y. 576.

reason doubtful; nor can the same be said to be unmarketable simply because the vendor is unable to show a regular and legitimate inception; and such title may, in many cases, be so free from doubt that its acceptance will be enforced upon the purchaser.[1] An actual continued occupation of premises, extending the entire statutory period, if adverse in character, will create a title equally as strong as one obtained by grant;[2] and it is immaterial to support title thus claimed whether there be a deed valid in form or whether there be no deed.[3] Yet where one has contracted to sell and convey a perfect title, and in fulfillment of his agreement tenders a title supported by prescription only, courts are slow to impose the same on the purchaser; and ordinarily, unless the vendor can show that circumstances were such as to permit the acquisition of a prescriptive title, and that the persons against whom he prescribes are not minors or otherwise entitled to the benefit of some disability, the title will be subject to doubt, and for this reason unmarketable.[4] On the other hand, if the vendor does not pretend to have a clear title, but expressly sells such as he has, without special covenants or warranty, he is entitled to specific performance without first being required to show title.[5]

§ 19. **Deficient quantity.** It is beyond dispute that a purchaser is entitled to all that he bargains for, and is under no obligation to accept a part or to accept compensation or abatement;[6] hence, if he contracts for the purchase of land of defined area or specified quantity, he is under no obligation to complete the contract if the vendor is unable to convey all that the agreement calls for.

It is a principle of equity that he who sells property on a description given by himself is bound to make good that description; and if it be untrue in a material point, even though the variance may be occasioned by a mistake, he must abide by the consequences of the variance. Yet it is a further

[1] Pratt v. Eby, 67 Pa. St. 376.

[2] Sherman v. Kane, 86 N. Y. 57: Dills v. Hubbard, 21 Ill. 328; Bowen v. Preston, 48 Ind. 367; Covington v. Stewart, 77 N. C. 148; and see Ryan v. Kilpatrick, 66 Ala. 332; Hunton v. Nichols, 55 Tex. 217; Jones v. Patterson, 62 Ga. 527.

[3] Rannels v. Rannels, 52 Mo. 108.

[4] Melvin v. Whitney, 13 Pick. (Mass.) 188; Arbuckle v. Ward, 29 Vt. 55.

[5] Broyles v. Bee, 18 W. Va. 514.

[6] Howard v. Kimball, 65 N. C. 175.

principle that in all cases courts of equity look to the substance of the contract, and do not permit small matters of variance to interfere with the manifest intention of the parties, especially where full compensation can be made on account of losses or deficiency in the land sold.[1]

There is a settled distinction between the case of a vendor coming into a court of equity to compel a vendee to perform, and of a vendee resorting to equity to compel performance by the vendor. In the former case, if the vendor cannot make out a title as to part of the subject-matter, or in case of a deficiency in the quantity of the land, equity will not compel the vendee to perform the contract even in part; but where a vendee seeks specific execution of an agreement, there is much greater reason for affording him the aid of the court when he is desirous of taking the part to which a title can be made. And so, where a vendor has rendered himself incapable of conveying all of the land contracted for, or where a defect of title exists as to a part of the land, or where there is a deficiency as respects the contract description and the land actually owned by the vendor, a purchaser may still have the contract specifically enforced so far as the vendor is able to perform, with an abatement or compensation for the deficiency of title, quantity or quality.[2]

§ 20. When the vendor cannot produce title contracted for. It is now a custom of general observance in this country to stipulate in the agreement of sale for an abstract of the records showing the title to the bargained property. This in itself would be sufficient to indicate that the title to be conveyed should not only be indefeasible, but fairly deducible of

[1] Foley v. Crow, 37 Md. 51; De Wolf v. Pratt, 42 Ill. 198; Davis v. Parker, 14 Allen (Mass.), 94; King v. Bardeau, 6 Johns. Ch. (N. Y.) 38; and see Towner v. Tickner, 112 Ill. 217.

[2] Jeffries v. Jeffries, 117 Mass. 184; Powell v. Connant, 33 Mich. 396; Morrs v. Elmdorf, 11 Paige (N. Y.), 277; Bensel v. Gray, 80 N. Y. 517; Roberts v. Lovejoy, 60 Tex. 253. Where the vendor agrees to convey the whole of a tract of land, and it afterwards turns out that he is only possessed of an undivided one-half of said land, the purchaser is entitled to performance as far as the vendor is able, viz.: to a deed for an undivided half of the land. Marshall v. Caldwell, 41 Cal. 611. And see Vreeland v. Blauvelt, 23 N. J. Eq. 483; Pratt v. Eby, 67 Pa. St. 396; Swepson v. Johnston, 84 N. C. 449; Luse v. Deitz, 46 Iowa, 205; Chisman v. Partee, 38 Ark. 31.

record; and where no other allusion to title is made, or where no other or different title is mentioned, such must be considered as the sense of the agreement. Where, however, the contract not only calls for an abstract, but expressly stipulates for a record title, none other, however good, can be substituted; and notwithstanding it is beyond dispute that adverse possession under the statute of limitations may ripen into a perfect title as strong and indefeasible as a title by grant, yet where a purchaser has contracted for a title of record he cannot be compelled to accept one based upon extraneous facts resting in parol. If the contract is to be enforced against him he is entitled to the very thing for which he has contracted; and if that be a title of record the offer of a title depending upon a variety of extrinsic circumstances to be established by parol evidence, however strong and unassailable it may be, is not a compliance with the agreement he has made, and imposes on him no duty or obligation of acceptance.[1] Indeed, to compel him so to do would be to violate the fundamental principles governing this branch of equity jurisdiction; for, in effect, it would be to substitute a new and different contract for that which the parties have entered into.

§ 21. Inadequate consideration. Inadequacy in contracts of sale may affect either the vendor or the vendee — that is, the purchase price may be excessive and out of proportion to the thing sold, or deficient as compared with its real value; or it may consist in the inequality of the contingencies to which the contract has reference. Whether mere inadequacy, either in the price or subject-matter, is sufficient to furnish grounds for refusing to decree a specific performance is a question which in former years was much discussed; and it seems to have been a rule of the early cases that inadequacy alone, if sufficiently great to make the bargain hard and unconscionable, would warrant a court of equity in denying relief by way of specific enforcement.[2] But this rule has long since been abrogated,[3] and the principle has become firmly

[1] Page v. Greely, 75 Ill. 400; Noyes v. Johnson, 139 Mass. 436; and see Hellreigel v. Manning, 97 N. Y. 56.

[2] See Clitherall v. Ogilvie, 1 Des. (S. C.) 250; Clement v. Reid, 9 S. & M. (Miss.) 535; White v. Flora, 2 Overt. (Tenn.) 426.

[3] See, also, "Inadequacy of price

established that inadequacy of consideration, whether alleged by vendor or vendee, when amounting only to hardship, furnishes no ground for equitable relief; that courts will refuse to assume the doubtful responsibility of revising men's bargains or of fixing the prices at which owners may dispose of their property, and, where there has been no admixture of fraud, will not relieve them from the consequences of contracts which they have willingly and understandingly entered into.[1]

Regarded as a ground of defense to an action for specific performance, it is beyond doubt the settled doctrine of this country that mere inadequacy unaccompanied by other circumstances is unavailing, and the parties must be decreed to perform that which they have agreed to do; but where the inadequacy is combined with unfairness or oppression of any kind, as where undue advantage has been taken or there has been a studied suppression of the true value of the property or misrepresentations of material facts, the evidence of overprice or under-price becomes of great weight, and fully warrants the consideration of a court of equity and the granting of equitable relief.[2] Yet it will be observed that in every instance of this kind it is the fraud rather than the inadequacy which furnishes the ground for relief; and the inadequacy is simply received as evidence of such fraud.[3] There may be cases, however, where the consideration is so grossly disproportionate as to amount in itself to presumptive evidence of unfairness; and while in such cases the inadequacy might not be of such a character as to justify a court in setting aside the transaction, it may yet be sufficient to induce it to

as a ground for rescission," ch. XXXI, § 11, *infra*, and authorities there cited.

[1] Harris v. Tyson, 24 Pa. St. 360; Hale v. Wilkinson, 21 Gratt. (Va.) 75; Lee v. Kirby, 104 Mass. 420; Curlin v. Hendricks, 35 Tex. 225; Harrison v. Town, 17 Mo. 237; Parmlee v. Cameron, 41 N. Y. 392; Cathcart v. Robinson, 5 Pet. (U. S.) 263; Howard v. Edgell, 17 Vt. 9; Fish v. Lesor, 69 Ill. 394; Blackwelder v. Loveless, 21 Ala. 371; Benton v. Shreeve, 4 Ind. 66.

[2] Harrison v. Town, 17 Miss. 237; Howard v. Edgell, 17 Vt. 9; Seymour v. De Lancy, 3 Cow. (N. Y.) 445; Fish v. Lesor, 69 Ill. 394; Blackwelder v. Loveless, 21 Ala. 371; Benton v. Shreeve, 4 Ind. 66; Hale v Wilkinson, 21 Gratt. (Va.) 75; Graham v. Pancoast, 30 Pa. St. 89; Margrof v. Muir, 57 N. Y. 155; Byers v. Surget, 19 How. (U. S.) 303.

[3] Seymour v. De Lancy 6 Johns. Ch. (N. Y.) 222; Nelson v. Betts, 21 Mo. App. 219.

stay the exercise of its discretionary power to enforce specific performance, leaving the parties to their remedy at law.[1]

An apparent exception has been made to the rule above stated in the case of contracts for the sale of expectancies and reversionary interests by heirs, etc., which are never enforced against the vendor unless the consideration appears to be full and adequate; and the burden of demonstrating this fact is in all cases thrown upon the purchaser. This exception had its origin in England, where, by reason of the peculiar land system there prevailing, contracts of this character are much more common than in the United States; and, while it has been followed to a limited extent by the courts of this country, the general rules first stated represent the law as it is usually administered.[2]

No rule has been or can be established wherewith to decide the question as to what constitutes such a disparity between the price paid and the actual value of the property as to invalidate the sale or warrant the refusal of a court to enforce the terms of the contract. In this respect the discretion reposed in the court in the application of the principles of equity is very marked, and the peculiar circumstances attending each case must furnish the clue for the exercise of this discretion.[3]

§ 22. **Inability to perform.** That the defendant is unable to carry into execution the contract he has made affords no

[1] Seymour v. Delancy, 6 Johns. Ch. (N. Y.) 222.

[2] See Mercier v. Mercier, 50 Ga. 546; Story, Eq. Jur. § 336, and notes; Pomeroy on Cont. § 191.

[3] In the early case of Butler v. Haskell, 4 Des. (S. C.) 697, a summary of the law is made which may fairly be considered as expressive of the general principles upon this subject as they exist to-day, and in which the court says: "The result of the cases seems to be that wherever the court perceives a sale of property to have been made at a grossly inadequate price, such as would shock a correct mind, this inadequacy furnishes a strong, and in general conclusive, presumption, though there be no direct proof of fraud, that an undue advantage has been taken of the ignorance, the weakness, distress or necessity of the vendor; and this imposes upon the purchaser a necessity to remove this violent presumption by the clearest evidence of the fairness of his conduct. And where there is great weakness of mind in a person executing a conveyance of land, arising from age, sickness or any other cause, though not amounting to absolute disqualification, gross inadequacy of consideration for the conveyance is a circumstance from which imposition or undue influence will be inferred."

ground of defense in an action for specific performance, for parties may lawfully contract for the sale of property which at the time of making the agreement is not within the vendor's power to convey;[1] and as the vendor cannot be permitted to say that he did not intend to acquire the title, it necessarily follows that he cannot urge, as a defense to the suit, that he does not possess the interest he has contracted to sell. Nor is it any defense in the vendor to say that he has disabled himself to comply with his agreement; and the vendee, in such case, is entitled to judgment that the vendor make reasonable efforts to re-acquire the title and convey to him.[2] Nevertheless, equity will not make vain decrees; and if from the nature of the contract and its attendant circumstances it appears that performance is impossible,[3] and particularly where the party seeking performance knew, at the time the contract was made, that the other party did not have title to the whole or any part of the land he agreed to convey, and where he shows no special grounds entitling him to relief; where he has not changed his situation in consequence of the contract so that he must suffer loss if it is not specifically performed, and his claim to relief stands solely upon his right to the advantage he has obtained by the contract; and where nothing appears from which it can be fairly inferred a suit at law will not afford him full and complete redress,—a court of equity will refuse to entertain the suit, either for performance or compensation, and will leave the complainant to his ordinary legal remedy.[4] But in all things equity has regard to the substance rather than the form of contracts; and while literal fulfillment may in many cases be impossible, yet when the agreement can be substantially carried out, and the intentions of the parties so effectuated as to do entire justice between them, the defense

[1] Rutland v. Brister, 53 Miss. 683; Dresel v. Jordan, 104 Mass. 407; Thompson v. Myrick, 20 Minn. 205.

[2] Welborn v. Sechrist, 88 N. C. 287. But see Swepson v. Johnston, 84 N. C. 499.

[3] As where the vendor, who had already mortgaged his land, agreed to convey it free of incumbrance, and the purchaser prayed a specific performance, but would not waive objection to the mortgage. Snell v. Mitchell, 65 Me. 48. Or where the vendor, who has been sued on his contract to convey, has not, and never did have, title to the land, and, being bankrupt, has no means with which to buy it for the vendee. Pack v. Gaither, 73 N. C. 95.

[4] Peeler v. Levy, 26 N. J. Eq. 330.

will never be permitted to prevail.[1] Thus, where a vendor contracted to convey certain land, and there was no such land, the court compelled him to convey land of equal value;[2] and in like manner if a vendor has agreed to convey the whole of a tract of land, or several different parcels, and it afterwards transpires that he is possessed of only a portion of the same, the purchaser may still insist on specific performance so far as the vendor is able.[3]

Ordinarily, specific performance will not be decreed on the application of the vendor, unless his ability to make such title as he has agreed to make is unquestionable;[4] yet it would seem that where a vendor is unable from any cause, not involving bad faith on his part, to convey each and every parcel of the land contracted to be sold, and it is apparent that the part which cannot be conveyed is of small importance, or is immaterial to the purchaser's enjoyment of that which may be conveyed to him, the vendor may insist upon performance with compensation to the purchaser, or a proportionate abatement from the agreed price, if that has not been paid.[5] But this can never be done where the part in reference to which the defect exists is a considerable portion of the entire tract, or is in its nature material to the enjoyment of that part about which there is no defect, or where the defect is of such a character as not to admit of compensation.[6]

§ 23. Where wife refuses to join in conveyance. With respect to the practice of courts of equity in the enforcement of contracts where the wife of the vendor refuses to join in the conveyance the law is not altogether settled, and in some instances there appear to have been decisions rendered which, when compared with others involving the same facts, would seem to be irreconcilable. Formerly it seems to have been the practice of the courts to specifically enforce such contracts and to require the husband to procure the wife's signature, and to imprison him until he did perform his covenant by so doing.[7]

[1] Shaw v. Livermore, 2 Greene (Ia.), 338. And see Waterman, Spec. Perf. § 126 *et seq.*; Fry, Spec. Perf. *290.

[2] Carey v. Stafford, 3 Swanst. (Eng. Ch.) 427, n.

[3] Marshall v. Caldwell, 41 Cal. 611.

[4] Griffin v. Cunningham, 19 Gratt. (Va.) 571.

[5] Foley v. Crow, 37 Md. 51.

[6] Shaw v. Vincent, 64 N. C. 690; Foley v. Crow, 37 Md. 51.

[7] Hall v. Hardy, 3 P. Wms. (Eng.)

The ruling in such cases was based upon the presumption that the husband had, before he entered into the covenant, first gained his wife's consent for that purpose.[1] This doctrine, which is of English origin, has been expressly repudiated by later American cases, and under these decisions specific execution of an agreement to sell and convey will not ordinarily be decreed against a vendor, a married man, whose wife refuses to join in the deed,[2] where there is no proof of fraud on his part in her refusal, unless the purchaser is willing to pay the full purchase money and accept the deed without her joining.[3] As a reason for such a course it is contended that no abatement which can be made in the purchase price, on the ground of her right of dower, will be just to both parties without making a new contract for them, for it is fundamental that a court cannot alter a contract and then enforce it. But if the wife's refusal to convey is not her voluntary act, but is made in bad faith, by a device of the husband to escape his just obligation, while he will not be compelled to procure his wife's signature to the deed, he may nevertheless be decreed to convey and to give to the purchaser indemnity against the claim of the wife.[4]

It has been stated in Iowa that the true rule in cases similar to those under consideration is to give to the vendee the option of accepting performance by the husband to the extent of his ability, and the retention of so much of the purchase money as shall be proportionate to the utmost possible outstanding or contingent interest not certainly conveyed to him, without interest, until the title is perfected, or to refuse such partial title and have his damages for the breach of the contract;[5] that if the vendee accepts the partial title the vendor ought to have the proportionate consideration therefor, and that the vendee should not be compelled to part with his money except upon receiving the title, and should not be required to accept the personal covenant of any person in lieu

189; Morris v. Stephenson, 7 Ves. (Eng.) 474.

[1] See Story, Eq. Jur., § 731 *et seq.*

[2] Seager v. Burns, 4 Minn. 141; Weed v. Terry, 2 Doug. (Mich.) 344: Clark v. Reins, 12 Gratt. (Va.) 98.

[3] Burk's Appeal, 75 Pa. St. 141; Reilly v. Smith, 25 N. J. Eq. 158; Lucas v. Scott, 41 Ohio St. 636; Phillips v. Stanch, 20 Mich. 369; Brewer v. Wall, 23 Tex. 585. If she will not sign the vendee must resort to his action at law for damages. Riez's Appeal, 73 Pa. St. 485.

[4] Peeler v. Levy, 29 N. J. Eq. 330.

[5] Troutman v. Gowing, 16 Iowa, 415.

of the title, though he may do so if he choose.[1] But this, while in many respects fair and just, is opposed to some of the best-established principles of equity, and is not in accord with the volume of authority on this subject. The rule as first stated may be considered as the one receiving the highest sanction, and this simply provides that the vendee may have conveyance by the husband's deed, but without the retention of any part of the purchase money to indemnify him against the contingent interest of the wife.[2]

The vendor may, of course, waive full performance and agree to take such title as the vendor can give. If, therefore, he agrees to waive a release of dower by the wife of the vendor, the latter cannot object to a performance on the ground that his wife refuses to sign the deed.[3]

It has been held that a married woman may be compelled to join in making a title to land which her husband has agreed to convey, she and he having received the purchase money, and she having stood by and seen the purchaser erect valuable improvements on the land in the belief that she would join in the conveyance.[4]

§ 24. **Incapacity of parties.** Mutuality being an essential ingredient of every contract sought to be specifically enforced, it necessarily follows that the incapacity of either party to make a valid agreement, or under some circumstances to execute it, will furnish a sufficient defense to the action, and preclude the interference of a court to grant this form of relief. The incapacity may be permanent or temporary; but in the latter case, if from any reason it has been removed so that upon performance the element of mutuality exists, the defense will be unavailing.[5] Infancy, imbecility, lunacy or gross in-

[1] Leach v. Forney, 21 Iowa, 271. This would seem to be the rule in Massachusetts also. See Davis v. Parker, 14 Allen (Mass.), 94.

[2] Reiz's Appeal, 73 Pa. St. 485; Hawralty v. Warren, 18 N. J. Eq. 124; Lucas v. Scott, 41 Ohio St. 636.

[3] Corson v. Mulvany, 49 Pa. St. 88.

[4] Overman v. Hathaway, 29 Kan. 434.

[5] Thus, while an infant cannot maintain a suit for specific performance, owing to the fact that his incapacity prevents the contract from being enforced against him, yet if after attaining his majority he affirms the contract by bringing suit or otherwise, the mutuality is restored. Both parties are then bound, and the former incapacity cannot be urged by either.

toxication[1] of the defendant at the time the contract was made may be successfully interposed by him by way of defense under the well-known principles of equity which demand that the contract be fairly and understandingly entered into; while the personal incapacity of the plaintiff at the time the suit is brought will, under the principle of mutuality already referred to, constitute a barrier to the further maintenance of the action.

§ 25. **Gifts and donations.** No rule is better established than that a court of equity will not enforce a voluntary contract or an unexecuted gift. Where the transaction is incomplete and without consideration, or resting upon a merely voluntary consideration, courts will not complete what they find imperfect. The entire current of modern authority fully sustains this proposition; and although in some of the earlier cases contracts based wholly upon a meritorious consideration have been carried into execution, the doctrine has never found favor in our courts of equity, and if it ever obtained must now be deemed overthrown by the weight of more recent adjudications.[2]

It does not follow, however, that a voluntary donation is without effect, for circumstances may so shape its character as to render unjust a refusal to specifically enforce; and this, too, even though the agreement may rest wholly in parol. Numerous authorities sustain the doctrine that a parol promise to convey, proven and established as the law requires, with notorious and exclusive possession, taken, retained and continued under and in pursuance of such agreement, with full knowledge on the part of the donor, together with permanent and valuable improvements placed upon the land by the donee upon the faith of such agreement, creates an obligation on the part of the donor that equity will specifically enforce.[3] Nor

[1] Conant v. Jackson, 16 Vt. 335; Donelson v. Posey, 13 Ala. 752; Brady's Appeal, 66 Pa. St. 277; Bradford v. Abend, 89 Ill. 78.

[2] Gilbert v. Holmes, 64 Ill. 548; Wadhams v. Gray, 73 Ill. 415; Keffer v. Grayson, 76 Va. 517; Burkholder v. Ludlam, 30 Gratt. (Va.) 255.

[3] Freeman v. Freeman, 43 N. Y. 34; Gwynn v. McCauley, 32 Ark. 97; Murphy v. Steel, 43 Tex. 123; Willis v. Mathews, 46 Tex. 478; Shellhammer v. Ashbaugh, 83 Pa. St. 24. A parol gift of land may be inferred from acts of an unambiguous and unequivocal character, as such as necessarily result from the gift, and they must establish by clear,

does this doctrine militate against the rule first stated; for while it is true that an executory promise not founded upon any valuable consideration is a mere nude pact, furnishing no grounds for an action at law and incapable of enforcement in equity, and so continues so long as the promise has no consideration, yet as anything that may be detrimental to the promisee or beneficial to the promisor will, in legal estimation, constitute a good consideration, the acts of the donee in taking possession and expenditures made upon permanent improvement upon the land with the knowledge of the donor, induced by his promise, constitute in equity a consideration for such promise.[1] To permit the donee to avoid performance under such circumstances would operate as a fraud; and the true ground upon which this equitable jurisdiction is exercised, although sometimes said to be part performance, is really to prevent a fraud being practiced upon the donee by the donor by inducing him to expend his money upon improvements upon the faith of the promise, and then deprive him of the benefit of the expenditure, and secure it to the donor by permitting the latter to avoid the performance of his agreement.

In the great majority of cases where specific enforcement has been sought of promises and agreements for conveyance based only on a meritorious as distinguished from a valuable consideration, the promise has rested entirely in parol; and where performance has been decreed, it was because of extraneous facts which would render any other course unjust and inequitable. But promises in writing are sometimes met with and under certain circumstances specifically enforced, not in opposition to the strongly-asserted doctrine as stated in the opening words of this paragraph, but in pursuance of well-

definite and certain evidence. The improvements made by the donee in possession of the land, under an alleged parol gift, though slight, are sufficient to pass the title if they are substantial and permanent, and are made in reliance on the gift, and are such as none but an owner would make. Poullain v. Poullain, 76 Ga. 420.

[1] Hardesty v. Richardson, 44 Md. 617; Freeman v. Freeman, 43 N. Y. 34; Burns v. Fox, 113 Ind. 205; Peter v. Jones, 35 Iowa, 512. The doctrine of the text finds its most numerous illustrations in agreements between parent and child; as where a father makes a verbal agreement with a son to convey to him a tract of land if the latter will go and live upon it, make expenditures upon and improve it, etc., and this is done in reliance upon such promise.

defined legal principles. Thus, a contract is made in the usual form, reciting a purchase price to be paid, and covenanting to convey upon payment of the purchase money. So far as the legal aspects of such a paper are concerned, it is immaterial what may have been the secret intentions of the parties. The agreement itself is not voluntary. There is no want of consideration. The promise of the vendee to pay the purchase price is a valid consideration for the promise of the vendor to convey; and the agreement being in writing, if signed by both parties, will make mutual obligations. It may be true that the intention of the parties is at variance with the terms of the agreement, but that will not affect the legal operation of the instrument. As the parties would thus stand, the vendee would be indebted to the vendor in whatever amount was named as the purchase price, and this debt the vendor might insist upon or forego at his option. A receipt for the purchase money, under such circumstances, would be a gift, not of the land, but of the debt; and the obligation for the purchase money being thus discharged, the whole beneficial interest in the land would vest in the vendee, who might demand the specific execution of the contract by conveyance.[1]

§ 26. Tender of performance — By vendee. A party in default has no standing in equity to compel performance by another party similarly situated. This is one of the best-known rules governing this branch of the law. Therefore, he who seeks to enforce a contract as against others must be

[1] Ferry v. Stevens, 66 N. Y. 321. This was an action to enforce specific performance of an agreement to convey lands, brought by a sister against the devisee of a deceased brother. A contract in due form was made, wherein deceased agreed to convey to the plaintiff on payment of $1,100, which she agreed to pay. It was never intended that she should pay anything, the consideration being inserted only to conceal the fact of gift from other relatives, and deceased subsequently indorsed upon the contract a receipt in full of the purchase price; but no money was in fact paid. *Held*, that whatever may have been the intent, the agreement to convey was not voluntary, as it was for a valuable consideration; that the contract did not operate as a gift of the land, and conclusively rebutted an intent to make a present gift; that the findings were, in effect, that the vendor, to accomplish his purpose of giving the land, gave the debt which represented his interest therein; that the receipt operated as a valid and complete gift of the debt, leaving the right of the plaintiff to a conveyance in force, as if the debt had been paid.

himself without default, and ready and willing to comply. In furtherance of this rule it has often been held that the party who seeks the remedy of specific performance must first tender a performance by the offer of a properly-executed deed if the vendor, or by a tender of the purchase money if the vendee.[1] This rule, however, is flexible, and is often made to yield to the exigencies of the particular case where a proper excuse is shown. Thus, where the purchaser, under a contract for a deed, offers to pay the last of the purchase money when due, and insists upon a deed, and the offer is declined by the vendor on the ground of there being an incumbrance on the land, so that he cannot give such title as he agreed to, this will be sufficient to show a readiness and willingness of the purchaser to perform his part of the contract, and a formal tender would not be necessary before filing a bill for specific performance.[2] So also if the vendor denies the obligation of the contract,[3] or places himself in such a position that it appears that if a tender of the price were made its acceptance would be refused, no tender need be made by the purchaser in order to support his action.[4] It is enough in such cases if the purchaser offer in his bill to bring in the money when the amount is liquidated and his decree granted.

But, as a general rule, a party cannot compel the specific performance of a contract in a court of equity unless he shows that he himself has specifically performed or offered to perform all the acts which formed the consideration for the undertaking on the part of the other contracting party.[5] Until there has been a substantial performance of the contract on the one side and a failure or refusal to perform on the other, neither party can complain or predicate rights of action.[6] Where the contract specifies no time within which it is to be performed, a demand must be made before suit can be sustained.[7]

[1] Irwin v. Bleakley, 67 Pa. St. 24; Cronk v. Trumble, 66 Ill. 428; Warren v. Richmond, 53 Ill. 52; Mhoon v. Wilkerson, 47 Miss. 633; Brown v. Hayes, 33 Ga. 136; Vawter v. Bacon, 89 Ind. 565.

[2] Mathison v. Wilson, 87 Ill. 51.

[3] Brock v. Hidy, 13 Ohio St. 306.

[4] Deichman v. Deichman, 49 Mo. 107; Brown v. Eaton, 21 Minn. 409.

[5] Stow v. Russell, 36 Ill. 18.

[6] Bishop v. Newton, 20 Ill. 175; Van Campen v. Knight, 63 Barb. (N. Y.) 205.

[7] Mather v. Scales, 35 Ind. 1.

A purchaser of land who brings suit for the specific performance of a contract to convey need not make an unconditional tender of the purchase money, nor is it necessary that he should pay it into court. It is sufficient to tender the money on condition that a deed is made to him; and if the vendor refuse to accept the money and perform his contract the vendee may allege such tender and refusal, and his own readiness to pay whatever sum may be found due upon a decree for a specific performance.[1]

§ 27. **Continued — By vendor.** The principles laid down in the preceding paragraph have equal reference to either party to the contract, and, as a general rule, the vendor should tender a deed and demand payment before bringing a bill for specific performance.[2] It has been held, however, that the omission to make a tender will not deprive a vendor of the right to relief, but only affects the question of costs,[3] and that the vendor may prepare a deed and present it with his bill, offering to deliver it on condition that the vendee comply with the terms of the contract.

But even though a tender may be necessary in ordinary cases, yet if the vendee, before the time fixed for the vendor to make him a conveyance, repudiates the contract, or announces his intention not to comply with the same, no tender of a deed to him need be made before a bill filed against him for specific performance.[4] For a vendor to enforce specific performance of the contract of sale, it is not essential that when he made the contract he should have had such title and capacity to convey the property, or such means and right to acquire it, as would have enabled him to fulfill it on his part. It is sufficient if he is able to convey when, by the terms of the contract or the equities of the case, he is required to do so in order to entitle himself to the consideration; and if time is not of the essence of the contract, nor made essential by an offer to fulfill by the purchaser and his request for a conveyance, the vendor will be allowed reasonable time and opportunity to obtain and perfect title.[5]

[1] Lynch v. Jennings, 43 Ind. 276.
[2] Klyce v. Broyles, 37 Miss. 524.
[3] Boston v. Nichols, 47 Ill. 353; Seeley v. Howard, 13 Wis. 336; Rutherford v. Haven, 11 Iowa, 587.
[4] Lyman v. Gedney, 114 Ill. 388.
[5] Dresel v. Jordan, 104 Mass. 407.

§ 28. **Where contract has been rescinded.** The rule seems to be well established that specific performance will not be decreed of a contract which the parties have treated as rescinded, or which has once been repudiated by the party who seeks enforcement.[1] Thus, the bringing of a suit to recover back the consideration money is equivalent to an express disaffirmance of the contract, and is, in legal contemplation, a virtual rescission, and the complainant cannot have a decree for the specific performance of the contract thus rescinded.[2] So also if, after the making of a written contract, a dispute arises as to its terms, etc., and by agreement the entire negotiations are set aside;[3] or where one of the parties has evaded or openly disavowed the contract, and has sought to acquire title to the land from others, or even from the vendor himself, but not under the contract;[4] or where there has been an express repudiation, notwithstanding the other party may at one time have sought performance,[5] a bill for performance cannot be maintained.

§ 29. **Verbal abandonment of contract.** Whatever may have been the former rule it would now seem to be established that the terms and conditions of a written contract, and even a covenant, may be dispensed with by a verbal agreement founded upon a proper consideration; and while this doctrine has never received serious question when applied to chattel agreements, it would seem that it is equally appli-

[1] Clement v. Evans, 15 Ill. 92.

[2] Smith v. Smith, 19 Ill. 349. This was a case where a party entered into a contract with his father to support him until his death, and in consideration thereof the father agreed to convey to him a certain farm, and the son, after the death of his father, filed a claim for care, nurture, services, etc., against the estate and was allowed therefor. And see Williams v. Forbes, 47 Ill. 148. It has been held, however, that where suit has been commenced but subsequently dismissed, this will not bar a bill for specific performance. Cable v. Ellis, 86 Ill. 525.

[3] Bowman v. Cunningham, 78 Ill. 48.

[4] Clement v. Evans, 15 Ill. 92.

[5] As where an owner of real estate repudiated a contract for its sale, on the ground that he had never authorized the agent to sell or execute a contract for him, the property then having largely increased in value, and waited until it depreciated below the contract price, *held*, that a court of equity would not decree a specific performance in his favor, though the purchaser had before sought to compel him to perform the same. Tobey v. Foreman, 79 Ill. 489.

cable to agreements concerning land. A formal release must, of course, be in writing; but a verbal agreement of abandonment of contract may be set up as a defense to an action for its breach and as a bar to an action for specific performance.[1] The cases in which this doctrine is held proceed upon the theory that the court will never decree that a contract be performed when to do so would be inequitable or oppressive. So, too, when a complainant has, by parol, waived or discharged a contract, and the defendant has entered into obligations inconsistent with its performance, it is an equity that will bar the remedy by specific performance.[2]

An express agreement to abandon is not necessary in order to defeat the remedy, and the parties may by their actions create conditions from which an abandonment may be a legitimate inference.[3]

§ 30. Though performance be refused, other relief may be granted. It does not follow that because a decree of specific enforcement is denied the bill should be dismissed; for equity has jurisdiction to grant compensation or to afford other adequate relief, in all cases of bills for specific performance, though denying the special relief prayed for.[4] Yet, while such jurisdiction exists, it is exercised only under special circumstances and upon peculiar equities — as where there has been fraud; or where one of the parties has disabled himself by matters occurring after the making of the contract; or where the law affords no adequate remedy.[5] The tendency of modern decis-

[1] Morrill v. Colehour, 82 Ill. 618; Stevens v. Cooper, 1 Johns. Ch. (N. Y.) 425.

[2] Huffman v. Hummer, 18 N. J. Eq. 90.

[3] As where the vendee was to pay $1,000 cash, and did pay $100. Shortly after he withdrew the balance of the cash from his attorney's hands and went away. Vendor tendered the deed to the attorney, who refused to accept it, as vendee had taken away his money. Vendor then wrote vendee requesting him to complete the contract. After waiting eleven days and receiving no answer from vendee, who was but eighty miles distant, vendor sold to a third person. *Held*, that vendee was not entitled to specific performance. Mason v. Owens, 56 Ill. 259.

[4] Rider v. Gray, 10 Md. 282.

[5] Busey v. McCurley, 61 Md. 448; Green v. Drummond, 31 Md. 71; King v. Thompson, 9 Pet. (U. S.) 204; Ada v. Echols, 18 Ala. 353; Payne v. Graves, 5 Leigh (Va.), 561. B. having brought his bill in equity against A., his trustee, in the alternative, either for a conveyance or for compensation in damages, and it appearing that A. had previously sold

ions, however, is to restrict this doctrine rather than to extend it;[1] and its exercise is now generally confined to those cases where it satisfactorily appears that the plaintiff has suffered an injury for which he ought to be compensated, but for which he has no remedy, or at best a doubtful and inadequate one at law.[2]

Where, by reason of the failure of title or for other cause, specific performance is impossible, and a court, of necessity, is obliged to refuse the remedy, it will not in general retain the suit and award compensatory damages,[3] but will leave the parties to their remedy at law. Nor will courts ordinarily decree compensation or damages where the defect or disability was known to the plaintiff at the time of the commencement of the suit[4] — this procedure being usually restricted to those cases where the vendor has disabled himself subsequently to the commencement of the action, or where for some reason full justice can only be attained by decreeing a recovery of damages; yet, even if before suit commenced the vendor has rendered specific performance impossible, but this fact is unknown to the vendee, who prosecutes his action in good faith, the court having acquired jurisdiction will retain the case and award a pecuniary satisfaction in lieu of the relief originally demanded.[5]

Where a specific enforcement cannot be decreed by reason of the bar of the statute, it seems the court should decree compensation to a vendee for the purchase money paid, and for

and conveyed the land, and received the purchase money, and thereby disabled himself from making a conveyance, it was also held that B. was entitled to recover the amount of the purchase money and interest, or, at his election, a sum equivalent to the present value of the land. Peabody v. Tarbell, 2 Cush. (Mass.) 226.

[1] Sands v. Thompson, 43 Ind. 24; Beal v. Chase, 31 Mich. 534; Hedrick v. Hern, 4 W. Va. 624.

[2] Gupton v. Gupton, 47 Mo. 47; Phillips v. Thompson, 1 Johns. Ch. (N. Y.) 131.

[3] Doan v. Mauzey, 33 Ill. 227; Smith v. Kelley, 56 Me. 64; Sternberger v. McGovern, 56 N. Y. 20; Milkman v. Ordway, 106 Mass. 232; McQueen v. Chouteau, 20 Mo. 222.

[4] Milkman v. Ordway, 106 Mass. 232; Morss v. Elmdorf, 11 Paige (N. Y.), 277; Smith v. Kelley, 56 Me. 64; Sternberger v. McGovern, 56 N. Y. 20.

[5] Carroll v. Wilson, 22 Ark. 32; Hopkins v. Gilman, 22 Wis. 476; Herrington v. Robertson, 71 N. Y. 283; Hamilton v. Hamilton, 59 Mo. 232; Foley v. Crow, 37 Md. 51; Harrison v. Deramus, 33 Ala. 463.

all lasting or permanent improvements erected by him, and for this purpose may properly retain the bill;[1] yet it is only in special cases that a court of equity will retain the bill merely for the assessment of damages, and the general tendency is to still further narrow the compass within which the power shall be exercised.[2]

§ 31. Auxiliary remedies — Ne exeat. A suit in equity against the vendee to compel a specific execution of a contract of sale, while in effect an action for the purchase money, has nevertheless always been sustained as a part of the appropriate and acknowledged jurisdiction of such court, although the vendor has, in most cases, another remedy by an action at law upon the agreement. Where it is evident, therefore, that the vendor is in a situation to give a clear and perfect title to the premises, and that the defendant is wholly without excuse in refusing to complete the purchase, so that a specific performance must be finally decreed, the vendor is entitled to such auxiliary remedies as the necessities of the case may require and the provisions of law will permit to enable him to realize the full fruits of his action. Upon furnishing the proper and usual evidence that the vendee intends to remove beyond the jurisdiction of the court, he may, it seems, be entitled to the writ of *ne exeat*. Nor does it seem that the abolition of imprisonment for debt has materially affected the remedy by *ne exeat* in cases of equitable cognizance, so far at least as respects the issuance of the writ in pending cases, though if the specific performance of the vendee consists merely in the payment of the purchase money, he could not be taken in execution on the decree.[3] The only effect of the *ne exeat* in such cases, then, would be to prevent the defendant from removing with his property beyond the jurisdiction of the court, and thus to render him amenable to such process as may be necessary to reach his property or to compel him to apply it in payment of the decree.[4]

[1] Parkhurst v. Van Cortlandt, 1 Johns. Ch. (N. Y.) 273; Masson's Appeal, 70 Pa. St. 30; Nagle v. Newton, 22 Gratt. (Va.) 820.

[2] Sands v. Thompson, 43 Ind. 24; Kempshall v. Stone, 5 Johns. Ch. (N. Y.) 193; Beal v. Chase, 31 Mich. 534.

[3] Brown v. Haff, 5 Paige (N. Y.), 235; and see Dean v. Smith, 23 Wis. 486.

[4] Brown v. Haff, 5 Paige (N. Y.),

To entitle the vendor to a writ of *ne exeat* he must show a demand actually due at the time the writ is issued, and that he is able to make a clear and unincumbered title to the premises agreed to be sold.[1]

§ 32. **Submissions and awards.** A court of equity has jurisdiction to enforce specific execution of an award concerning real estate, or of an agreement for the purchase or sale of real estate, notwithstanding it involves the enforcement of an award to pay money.[2]

235; Cowdin v. Cram, 3 Edw. Ch. (N. Y.) 233.

[1] Cable v. Alvord, 27 Ohio St. 666; Brown v. Haff, 5 Paige (N. Y.), 235.

[2] Where, by the terms of the submission, the amount fixed by the award is to be a lien on the property, which can be enforced only in a court of equity by sale under a decree of the court, the lien attaches upon the making of the award, and furnishes an element of equity jurisdiction. Memphis, etc., R. R. Co. v. Scruggs, 50 Miss. 284.

Art. II. Of Parol Contracts.

§ 1. General principles.
2. The contract.
3. Payment of the purchase money.
4. Possession.
5. Expenditures and improvements.
6. Verbal agreement to procure title and convey.
7. Parol promise to purchase for another.
8. Compensation for improvements.
9. Parol gifts.
10. Against vendee.
11. Marriage — Ante-nuptial agreements.
12. Parol variation of written agreements.

§ 1. General principles. A parol contract for the sale or conveyance of land is not in itself void, and if treated by the parties as obligatory until executed is not distinguishable in effect from one which has been duly reduced to writing and properly signed. It is only at the enforcement of such contracts while they remain executory that the statute is aimed; and experience has fully demonstrated that in this respect it was founded in wisdom, and that its maintenance is essential to the preservation of the titles to real estate from the chances, the uncertainty and the fraud to which they would otherwise be subjected by the admission of parol testimony. But while the law forbids the maintenance of an action to enforce a parol contract, it does not even purport that such contract shall be absolutely void, and by implication does admit that as between the parties it may give rise to equities as binding upon the conscience as if the same were evidenced by writing. Indeed, the law was created and has since been maintained as a rule of public policy only, and it is in this view that courts of equity, instead of holding such contracts nugatory, have sometimes sustained and enforced them in cases where the contract has been admitted in the pleadings, and the defense arising from the statute waived by neglect to rely upon it.[1]

Again, while the statute is rigid and inflexible as a rule of law, courts of equity, whether wisely or not it is now too late to inquire, have reduced the rigidity of the rule when invoked as such, and, where there has been a partial performance,

[1] Minus v. Morse, 15 Ohio, 568; Newton v. Swazey, 8 N. H. 9; Creswell v. McKaig, 11 Neb. 227.

have removed the bar of the statute, upon the ground that it is a fraud for the vendor to insist on the absence of a written instrument when he had permitted the contract to be partly executed.[1]

The theory upon which courts of equity proceed in the case of specific enforcement of parol agreements partly performed seems to be that, in a suit founded on the equitable consequences of the part performance, the defendant is really "charged" upon the equities resulting from the acts done in execution of the contract, and not (within the meaning of the statute) upon the contract itself. If such equities were excluded, it is contended, injustice of a kind which the statute cannot be thought to have had in contemplation would follow. Where a parol contract is completely performed as to everything except conveyance, and the vendee on its faith has incurred expense and responsibilities, then, it is held, the matter has advanced beyond the stage of contract, and the equities which arise out of the stage which it has reached cannot be administered unless the contract is regarded. Hence, it is said, it is neither arbitrary nor unreasonable to hold that when the statute says that no action is to be brought to charge any person upon a contract concerning land it has in view the simple case in which he is charged upon the contract only, and not that in which there are equities resulting from matters subsequent to and arising out of the contract.[2]

But while equity thus interferes to save a party from the consequences of his own disregard of law, it strenuously insists on full, satisfactory and indubitable proof of all facts necessary to confer jurisdiction. The contract itself must first be shown, certain and definite in all its terms;[3] while the acts of part performance relied upon must further appear to have been unequivocally in execution of such contract,[4] and of such

[1] Barnes v. Boston, etc. Co. 130 Mass. 338; Jamison v. Dimock, 95 Pa. St. 52; Purcell v. Coleman, 4 Wall. (U. S.) 513; Neale v. Neale, 9 Wall. (U. S.) 1; Burnett v. Blackman, 43 Ga. 569; Green v. Jones, 76 Me. 563; Anderson v. Shockley, 82 Mo. 250; Judy v. Gilbert, 77 Ind. 96; Hanlon v. Wilson, 10 Neb. 138.

[2] See Maddison v. Alderson, 8 App. Cas. (Eng.) 467.

[3] Wharton v. Stoutenburg, 35 N. J. Eq. 266; Wallace v. Rappleye, 103 Ill. 229; Morgan v. Bergen, 3 Neb. 209.

[4] Worth v. Worth, 84 Ill. 442; Wheeler v. Reynolds, 66 N. Y. 231; Williams v. Morris, 95 U. S. 457.

a character as would render them incapable of full compensation by a recovery of damages in a court of law.[1]

Upon decreeing specific performance of a parol contract upon the ground of part performance the court will be governed by the same principles in adjusting the equities of the parties as upon a contract in writing valid by the statute of frauds. If the vendor is unable to fully comply with the contract the vendee will have an election to have the contract specifically performed so far as the vendor can perform it, and an abatement of the purchase money, or compensation for any deficiency in title, quantity or other matter touching the estate.[2]

§ 2. **The contract.** It is a well established rule that the primary inquiry in all cases where enforcement is sought of a parol agreement for the conveyance of land goes to the existence of the contract itself, and, before anything can be shown relative to its fulfillment, all its terms and conditions must be clearly and definitely established by unequivocal and convincing proof.[3] If the evidence fails to establish the contract as alleged, or if any of its terms are left in doubt or uncertainty, or if any material part of it still rests in treaty and remains to be settled by further negotiation, it will not be specifically enforced.[4] It must further be made to appear that the terms and stipulations of the contract have been relied on by the party seeking its enforcement.[5]

[1] Brown v. Hoag, 29 N. W. Rep. (Minn.) 135. S. verbally agreed with F. for the purchase of lands for $1,125, and on S. sending $525 and three notes and a mortgage on the land for the balance, F. was to make a deed to S. In pursuance of the agreement S. sent the money and the notes and mortgage to F., but F. refused to make the deed. *Held*, that a suit for specific performance would not lie, S. having a complete remedy at law. Smith v. Finch, 8 Wis. 245.

[2] Harsha v. Reid, 45 N. Y. 415.

[3] Hartwell v. Black, 48 Ill. 301; Aday v. Echols, 18 Ala. 353; Newton v. Swazey, 8 N. H. 9; Eaton v. Whitaker, 18 Conn. 222; Freeman v. Freeman, 43 N. Y. 34; Cole v. Cole, 41 Md. 301; Ford v. Finney, 35 Ga. 258; Farrar v. Patton, 20 Mo. 81; Johnson v. Bowden, 37 Tex. 621; Gregg v. Hamilton, 12 Kan. 333; Littlefield v. Littlefield, 51 Wis. 23; Manley v. Howlett, 55 Cal. 94; Lamb v. Hinman, 46 Mich. 112; Campbell v. Fetterman, 20 W. Va. 398.

[4] Aday v. Echols, 18 Ala. 353; Lord's Appeal, 105 Pa. St. 451; Beal v. Clark, 71 Ga. 818; Sutton v. Myrick, 39 Ark. 424; Hopkins v. Roberts, 54 Md. 312.

[5] Gosse v. Jones, 73 Ill. 508; Wheeler v. Reynolds, 66 N. Y. 231.

§ 3. **Payment of the purchase money.** It may be stated as an unbending and inflexible rule, that, in all cases of a parol sale of land for a pecuniary consideration, mere payment of the purchase price, unaccompanied by any other act, is never sufficient to take the transaction out of the operation of the statute of frauds.[1] If, in addition, there has been a delivery of possession, a different case is presented; and for the reason that it would perpetrate a fraud upon the vendee to accept a portion of the contract price, and after permitting or inducing him to move upon the premises, thereby involving trouble and possibly incurring expense, to interpose the statute as a defense when called upon to complete the sale, equity will specifically enforce the conveyance.[2] But this, with other acts involving the principle last stated, must concur with the payment of the purchase money; for a parol contract will never be specifically enforced where the acts of part performance relied upon to take the case out of the operation of the statute are such as can be readily compensated in damages, and when this consists simply of the payment of money the remedy at law is ample for the recovery of the amount so paid.[3]

§ 4. **Possession.** By the concurrence of all the American authorities possession may fairly be considered as the first, and in many instances the best, of all the elements that contribute to take a parol contract out of the operation of the statute of frauds. Coupled with payment, improvements, expenditures and other like ingredients, it will rarely prove ineffectual; but even without these adjuncts it will in a majority of cases be a sufficient partial performance to escape the rigors

[1] Blanchard v. McDougal, 6 Wis. 167; Horn v. Ludington, 32 Wis. 77; Temple v. Johnson, 71 Ill. 13; Poland v. O'Conner, 1 Neb. 50; Glass v. Hulbert, 102 Mass. 28; Holmes v. Evans, 48 Miss. 248; Wood v. Jones, 35 Tex. 61; Minturn v. Baylis, 33 Cal. 129; Forrester v. Flores, 64 Cal. 24; Peckham v. Balch, 49 Mich. 179; Neal v. Gregory, 19 Fla. 356.

[2] West v. Bundy, 78 Mo. 407; Drum v. Stevens, 94 Ind. 181; Green v. Jones, 76 Me. 563; Woodbury v. Gardner, 77 Me. 68; Halsey v. Peters, 79 Va. 60; Anderson v. Shockley, 82 Mo. 250; Pleasanton v. Raughley, 3 Del. Ch. 124; Gregg v. Hamilton, 12 Kan. 333; Johnson v. Bowden, 37 Tex. 621.

[3] Neal v. Gregory, 19 Fla. 356; Moyer's Appeal, 105 Pa. St. 432; Ward v. Stuart, 62 Tex. 333; Peckham v. Balch, 49 Mich. 179; Temple v. Johnson, 71 Ill. 13; Horn v. Ludington, 32 Wis. 73.

of the statute and support an action for specific performance.[1] But in order to constitute a part performance within the rule it is essential that such possession should have been assumed and continued under and in pursuance of the alleged contract;[2] that it should have been taken with the consent of the vendor[3] and retained openly and exclusively.[4] An express delivery of possession or direct consent on the part of the vendor is not indispensable to the maintenance of the vendee's rights, but there must, at least, be corroborating circumstances tending clearly and unequivocally to show that the entry was lawful and the continuance of possession permissive.[5]

It is not every possible act of vendee done with reference to a parol contract that will remove it from the operation of the statute of frauds, but only those to which he has been induced by positive action or permission of the vendor, or at most by those results that naturally flow from the agreement.

§ 5. **Expenditures and improvements.** While naked possession will in many instances be a sufficient part performance to take the contract out of the operation of the statute, it follows with stronger reason that where the vendee upon the faith of the agreement has, in addition, made valuable or lasting improvements, thereby placing himself in a situation which may not lie in compensation, and so changing the relation of the parties as to prevent a restoration to their former condition, the vendor should not be permitted to urge that the agreement is void and thus secure to himself the benefit of the vendor's part performance and at the same time leave him

[1] Harris v. Knickerbocker, 5 Wend. (N. Y.) 638; Seaman v. Ascherman, 51 Wis. 678; Arrington v. Potter, 47 Ala. 714; Jefferson v. Jefferson, 96 Ill. 551; Pindall v. Trevor, 30 Ark. 249; Arnold v. Stephenson, 79 Ind. 126; McCarger v. Rood, 47 Cal. 138; Coe v. Johnson, 93 Ind. 418; Anderson v. Simpson, 21 Iowa, 399; Lamb v. Hinman, 46 Mich. 112; Potter v. Jacob, 111 Mass. 32.

[2] Wood v. Thornly. 58 Ill. 464; Carrolls v. Cox, 15 Iowa, 455; Rosenthal v. Freeburger, 26 Md. 75; Judy v. Gilbert, 77 Ind. 96; Ham v. Goodrich, 33 N. H. 32, Greenlee v. Greenlee, 22 Pa. St. 225; Chambliss v. Smith, 30 Ala. 366; Wharton v Stoutenburgh, 35 N. J. Eq. 266.

[3] Freeman v. Freeman, 43 N. Y. 34; Moore v. Higbee, 45 Ind. 487; Howe v. Rogers, 32 Tex. 218.

[4] Moore v. Small, 19 Pa. St. 461; Charpiot v. Sigerson, 25 Mo. 63.

[5] As where possession was taken and held with the knowledge of the vendor, who made no objection, a consent was presumed. Purcell v. Coleman, 4 Wall. (U. S.) 513.

without an adequate remedy at law.[1] The acts relied upon to show part performance must, however, have been done in pursuance of the agreement and be referable to that alone,[2] and must further be of such a character that to refuse a decree of specific performance would operate as a fraud on the vendee, and place him in a situation for which money would not afford a sufficient compensation.[3] It has been held that, in order to avail as a part performance, the improvements must be of a permanent nature or of great value,[4] and that if such improvements are of less value than the use and occupation of the property the remedy will be denied;[5] and such views are certainly in consonance with the commonly accepted doctrine of part performance and with the reasons usually assigned for its maintenance. Yet a line of contrary cases holds that no exception arises from the fact that the purchaser may appear to have been compensated for his improvements by the use of the land; that equity regards possession and improvements upon the faith of the contract as a substitute for the memorandum required by the statute, without reference to the inquiry whether the benefits received by the purchaser equal or exceed the value of the improvements put upon the land by him.[6] The law must be considered, therefore, as fairly well established, that, where possession has been taken and continuously held in pursuance of a prior parol contract, it is not essential that the improvements should be such as could not

[1] Willis v. Mathews, 46 Tex. 478; Potter v. Jacobs, 111 Mass. 32; Drum v. Stevens, 94 Ind. 181; Hiatt v. Williams, 72 Mo. 214; Bohanan v. Bohanan, 96 Ill. 591; Kinyon v. Young, 44 Mich. 339; Littlefield v. Littlefield, 51 Wis. 23; Manly v. Howlett, 55 Cal. 94; Tracy v. Tracy, 14 W. Va. 243; Hanlon v. Wilson, 10 Neb. 138. In other words, the statute of frauds having been enacted for the purpose of preventing fraud should not be used fraudulently. Ash v. Hare, 73 Me. 403.

[2] Sutton v. Myrick, 39 Ark. 424; Campbell v. Fetterman, 20 W. Va. 398; Gosse v. Jones, 73 Ill. 508; Willis v. Mathews, 46 Tex. 478; Reese v. Reese, 41 Md. 554; Lester v. Kinne, 37 Conn. 9.

[3] Campbell v. Fetterman, 20 W. Va. 398; Temple v. Johnson, 71 Ill. 13; Semmes v. Worthington, 38 Md. 298; Pierce v. Catron, 23 Gratt. (Va.) 588.

[4] Peckham v. Barker, 8 R. I. 17.

[5] Eason v. Eason, 61 Tex. 225; Ann Berta Lodge v. Leverton, 42 Tex. 18.

[6] Mims v. Lockett, 33 Ga. 9; and see Gregg v. Hamilton, 12 Kan. 333; Fall v. Hazelrigg, 45 Ind. 576; Freeman v. Freeman, 43 N. Y. 34; Hoffman v. Fett, 39 Cal. 109; Tate v. Jones, 16 Fla. 216; Green v. Finin, 35 Conn. 178; Blakeney v. Ferguson, 8 Ark. 272.

be compensated in damages, and that the equities of the vendee may rest upon other equally available grounds.[1]

§ 6. **Verbal agreement to procure title and convey.** While a vendor who, for a valuable consideration, enters into a verbal contract for the sale of premises to which he has no title, and who subsequently acquires the same, will be bound to specifically perform his contract when the purchaser has taken possession under it and made valuable improvements, a different rule prevails where the promise was without consideration, or where the agreement was to convey provided the vendor should succeed in procuring title. It is fundamental that, to take a verbal contract out of the operation of the statute of frauds, possession of the property must be taken under a contract of purchase, or an agreement to give the same, and such contract, to give validity to an entry made thereunder, must be with one having title, either in possession or expectancy.[2] If the vendor at the time of such entry has no title, or possesses merely a usufructuary right in the property by lease or otherwise, the entry is regarded as having been made under a mere license, and the occupancy that of a tenant at sufferance.[3]

§ 7. **Parol promise to purchase for another.** There is another class of contracts, which, while they fall clearly and distinctly within the statute of frauds, are yet liberally regarded in a court of equity and enforced in all proper cases. It occurs where one has acquired the legal title to lands under a promise to convey them to another, and then refuses to keep his promise and retains the property as his own. This is often illustrated in the case of execution or other similar public sales, where the purchaser agrees to take and hold the title for the execution debtor or other interested owner, and to reconvey the same on being reimbursed for whatever outlay may have been entailed. Such purchaser is regarded as holding the land charged with an implied trust which equity will compel him to execute by a conveyance according to agreement.[4]

[1] Jamison v. Dimock, 95 Pa. St. 52.

[2] Kaufman v. Cook, 114 Ill. 11.

[3] As where one having no title to premises leases the same from the owner, and puts another in possession thereof under a promise to give to the latter the property in case he can acquire the title, the person so put into possession will occupy the position of merely a tenant at sufferance of the party having the leasehold interest. Kaufman v. Cook, 114 Ill. 11.

[4] Rose v. Bates, 12 Mo. 30; McCas-

§ 8. **Compensation for improvements.** As has been shown, a court of equity may refuse performance, yet having acquired jurisdiction may retain the bill and award compensation. Parol contracts afford many instances of the exercise of this power, which is freely resorted to in cases where its refusal would result in manifest fraud, injustice or oppression. Expenditures and improvements upon the land, made upon the faith of the contract, have frequently been held to constitute such a part performance as to take the case out of the operation of the statute of frauds and authorize a decree for specific execution; but where the expenditures or improvements are such as do readily admit of full compensation, and complete justice between the parties can be effected in this way, it is the duty of courts, where specific performance cannot be decreed, to decree compensation to the amount of the purchase money paid, with interest, and the value of the improvements placed upon the land by the purchaser.[1]

A part performance will not be sufficient to take a parol agreement out of the statute unless the terms of the agreement distinctly appear or are made out to the satisfaction of the court; nor will a contract partly in writing and partly resting in parol, where a part performance is set up, be sufficient ordinarily to take a case out of the statute; yet where possession has been taken of land and improvements made under such imperfect agreements, though the court will not grant relief on the ground of part performance, yet the bill should be retained for the purpose of affording the party a reasonable compensation for beneficial and lasting improvements.[2]

By the old rules of the common law every person who improved land did so at his peril; and notwithstanding that he might have acted in good faith and under an honest conviction that the land belonged to him, yet if the legal title was ad-

key v. Graff, 23 Pa. St. 321; Ryan v. Dox, 34 N. Y. 307.

[1] Cox v. Cox, 59 Ala. 591; Powell v. Young, 45 Md. 497; Parkhurst v. Van Cortlandt, 1 Johns. Ch. (N. Y.) 273; Johnson v. Glancy, 4 Blackf. (Ind.) 94; Mathews v. Davis, 6 Humph. (Tenn.) 324; Dorn v. Dunham, 24 Tex. 366; McGee v. Wallis, 57 Miss. 598.

[2] Parkhurst v. Van Cortlandt, 1 Johns. Ch. (N. Y.) 273; Cox v. Cox, 59 Ala. 594; Stearns v. Beckham, 31 Gratt. (Va.) 421. And it seems that compensation may be decreed in such case without a special prayer therefor in the bill. Powell v. Young, 45 Md. 497.

judged to be in another, such adjudication not only established the right of such other to the land, but also to all the improvements situated upon it. But whatever may have been the ancient rule, the law at the present time has firmly established the doctrine that where the labor or money of one person has been expended in the permanent improvement and enrichment of another's property under a parol contract or agreement which cannot be enforced because, and only because, it is not in writing, the party repudiating the contract, as he may do, will not be allowed to take and hold the property thus improved and enriched without compensation for the additional value which those improvements have conferred upon it;[1] and it rests upon the broad principle that it is against conscience that one man shall be enriched to the injury and cost of another, induced by his own act.[2]

It is a well-established principle, however, that a court of equity will not give to an occupant compensation for improvements unless there are circumstances attending his possession which affect the conscience of the owner and impose on him an obligation to pay for them, or at least to allow for their value against a demand for the use of the property. Hence, if one who has purchased by parol fails to comply with the terms of his contract and abandons the possession without the fault of the vendor, he would have no just claim for the value of any improvements he may have placed on the land.[3]

A parol contract to pay for the improvements upon land is not within the statute of frauds as a sale of an interest in land;[4] and it seems that, if the vendor stipulates to pay for the improvements, but makes no contracts as to rents, and on his refusal to complete the agreement he is sued for the improvements, he cannot complain that the rents of the premises were not allowed to him as a set-off to the improvements.[5]

§ 9. **Parol gifts.** As a general rule equity will not interfere to compel the execution of a parol gift[6] upon the princi-

[1] Pitt v. Moore, 99 N. C. 85; Herring v. Pollard, 4 Humph. (Tenn.) 362; Valle v. Fleming, 29 Mo. 152; Dorn v. Dunham, 24 Tex. 366; McGee v. Wallis, 59 Miss. 598.

[2] Pitt v. Moore, 99 N. C. 85; Hedgepeth v. Rose, 95 N. C. 41; Thouvenin v. Lea, 26 Tex. 612; Harris v. Harris, 70 Pa. St. 170.

[3] Rainer v. Huddleston, 4 Heisk. (Tenn.) 223.

[4] Godeffroy v. Caldwell. 2 Cal. 489.

[5] Thouvenin v. Lea, 26 Tex. 612.

[6] Hoig v. Adrian College, 83 Ill. 267.

ple that the transaction is incomplete, and that the court will not complete what it finds imperfect.[1] It is immaterial that a party may have actually executed a deed intended by him to perfect a mere donation, and have agreed to deliver the same, for until delivery the donor may change his purpose, and should he refuse to so deliver, equity cannot compel a performance.[2]

But if the gift was accompanied by a transfer of possession, and if the donee in reliance thereon has made valuable improvements upon the land, such gift may be sufficient to support the donee's suit for specific performance.[3] But a parol promise will not be enforced merely because of the donee's possession under the promise;[4] there must, in addition, be some meritorious claim to support such possession.

Where the right to enforce a parol gift is established the right survives to the heirs of the donee, and upon his death his heirs will be entitled to a deed.[5]

§ 10. Against vendee. In the preceding paragraphs the subject of the specific enforcement of parol agreements to convey has been discussed mainly from the stand-point of the vendee, as in the majority of cases where equity is asked to compel performance or grant relief against a parol contract the petition comes from one who has acquired rights or incurred expense in regard to the land upon the faith of a verbal understanding. But the remedy is not wholly confined to vendees; and cases which appeal to equity may be presented by the vendor. Thus, where a purchaser has been let into possession of land sold to him by parol, some part of the purchase money having been paid, and the purchaser while so in possession strips the land of its timber, which constitutes one of its most valuable qualities, a case would be made wherein a

[1] Wadhams v. Gay, 73 Ill. 415.

[2] Hoig v. Adrian College, 83 Ill. 267.

[3] Dawson v. McFaddin, 22 Neb. 131; Mahon v. Baker, 26 Pa. St. 519; Burkholder v. Ludlam, 30 Gratt. (Va.) 255; Freeman v. Freeman, 43 N. Y. 35; Bright v. Bright, 41 Ill. 97; Langston v. Bates, 84 Ill. 524.

[4] Anderson v. Scott, 91 Mo. 637.

[5] Walker v. Walker, 42 Ill. 311. In this case A. and wife executed a deed to their son, but retained the possession of the deed. A. treated his son as the owner of the land, and permitted him, under this belief, to make valuable improvements thereon. Upon th eson's death the deed was destroyed. *Held*, that the son's heirs were entitled to a deed from A.

court of equity might compel the purchaser to complete his agreement and pay the balance of the purchase money.[1]

§ 11. Marriage — Ante-nuptial agreements. While marriage is beyond question a good consideration in support of a deed or an agreement to convey, yet it seems to stand substantially upon the same footing as other considerations deemed good in law; and promises made in respect thereto, when relating to the conveyance of land, are subject to the operation of the statute of frauds. There may undoubtedly be cases of a part performance of oral ante-nuptial agreements sufficient to warrant their enforcement in equity,[2] but it seems to be generally agreed that marriage alone does not amount to such part performance.[3] This is somewhat of a variance from the rule which prevails in other cases of contracts, but in this respect a subsequent marriage is always treated as a peculiar case, standing on its own grounds.[4] Possession, in most cases, would be a sufficient part performance; but where the claimant resides with the other party, as in the case of husband and wife, this fact will not make any appreciable difference. The reason assigned for holding possession to be part performance is that unless validity be given to the agreement the vendee would be a trespasser; but it is manifest that this reason would not apply where the vendor was the husband and the vendee the wife, living with him upon the property.

But while marriage in itself is not regarded as a part performance of an agreement to convey, as in the case of a marriage settlement, yet where a party by fraudulent artifice is induced to make an irretrievable change of situation, this is regarded as ground for relief in equity. Hence, where a person is induced to marry another upon the faith that a settlement had been made, or the assurance that it would be executed, the other party is held to make good the agreement, and is not permitted to defeat it by pleading the statute.[5] In such event the element of fraud, coupled with the facts, furnishes sufficient ground for equitable interference, and the complainant, having been induced by the vendor to irretrievably alter his or her

[1] Chambers v. Rowe, 36 Ill. 171.
[2] Neale v. Neale, 9 Wall. (U. S.) 1.
[3] Henry v. Henry, 27 Ohio St. 121.
[4] 2 Story, Eq. Jur. § 768.
[5] Glass v. Hulbert, 102 Mass. 24; Green v. Green, 34 Kan. 740.

condition, would be entitled to a specific enforcement of the agreement, and the statute of frauds would not apply.

§ 12. **Parol variation of written agreements.** In the foregoing paragraphs, references has been made only to contracts and agreements resting wholly in parol. It very often happens, however, that contracts are reduced to writing and afterwards changed or varied in some respect by parol negotiations and agreements. The rule is general that where the contract is of such a character as by the statute of frauds it must be evidenced by a writing, and this is done, new terms subsequently introduced, producing material variations and not partaking strictly of the nature of collateral undertakings, must also be reduced to writing and made part of the memorandum.[1] But where the parol variation has been in part performed, equity, acting upon its general principles, may decree a specific performance of the agreement as varied by parol.[2]

[1] Dana v. Hancock, 30 Vt. 116.

[2] Mr. Sugden sums up the result of the English authorities as to a parol variation as follows: (1) That evidence of it is totally inadmissible at law. (2) That in equity the most unequivocal proof of it will be expected. (3) That if it be proved to the satisfaction of the court, yet it can not be used as a defense to a bill demanding a specific performance of the original contract alone, or as a ground for granting a specific performance of the original contract, with the variation by parol, unless there has been such a part performance of the new parol agreement as would enable the court to grant its aid in the case of an original independent agreement, and then, in the view of equity, it is tantamount to a written agreement, and effect will be given to it, either in favor of a plaintiff or defendant. 1 Sug. Vend. 254 (Perkins' ed.).

CHAPTER XXIX.

REFORMATION.

§ 1. General principles.
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28. Reformation will not lie after an action at law.

§ 1. General principles. The correction of mistakes in contracts, agreements, deeds and every description of instruments in writing is alone cognizable in a court of equity, and forms one of the most extensive and important branches of equity jurisdiction. It is a power that has long been uniformly exercised, not only for the rectification of a mistake, so as to enable parties to assert legal rights under the contract when corrected, but for the double purpose of rectifying the mistake and then enforcing a specific performance of the agreement. Whenever, therefore, a mistake is charged and put in issue, equity will permit it to be inquired into, and upon satisfactory proof to be corrected.[1] Its primary object, however, is to relieve parties only against mistakes of fact, and not against mistakes of law;[2] and, as a rule, however mistaken parties

[1] Peterson v. Grover, 20 Me. 367; Blodget v. Hobart, 18 Vt. 414; Canedy v. Marcy, 13 Gray (Mass.), 373; Kelly v. McKinney, 5 Lea (Tenn.), 164; Damn v. Moon, 48 Mich. 510.

[2] Wood v. Price, 46 Ill. 439; Shear v. Robinson, 18 Fla. 379.

may have been as to the meaning of the words[1] or the legal effect of the language used,[2] where there has been no mixture of oppression, abused confidence or surprise in matters of fact, if the words are written as the parties intended they should be written or supposed they were written when they signed the contract, no relief can be granted either at law or in equity.[3] But where the instrument by reason of mistake fails to execute the intention of the parties, the duty of correction is unquestionable, and it is immaterial whether the instrument is an executory or executed agreement.[4] The party aggrieved by a mistake may have relief as well where he is plaintiff as where he is defendant.

Where a deed is void for patent ambiguity, the title should be perfected by an action to reform the deed.[5]

§ 2. Of deeds. A deed will never be reformed by the decree of a court on the ground of mistake, so as to make it express something entirely different from what is written on its face, except upon evidence of the clearest and most satisfactory character.[6] A mere preponderance of evidence is not sufficient;[7] and the mistake must be mutual and common to both parties to the instrument.[8] The fact that deeds of conveyance and written instruments are required to evidence title to lands calls for the utmost stringency in the application of those rules which have been adopted to remedy errors or correct mistakes; and the proof in such cases should be clear, consistent, full, circumstantial and satisfactory.[9] It would be hazardous in the

[1] Sibert v. McAvoy, 15 Ill. 106; Barnes v. Bartlett, 47 Ind. 98.

[2] Gordere v. Downing, 18 Ill. 492; Weed v. Weed, 94 N. Y. 243; Hakes v. Hotchkiss, 23 Vt. 231.

[3] Barnes v. Bartlett, 47 Ind. 98; Bradford v. Bradford, 54 N. H. 463; Hair v. La Brouse, 10 Ala. 548.

[4] Leitensdorfer v. Delphy, 15 Mo. 160; Penniman v. Winner, 54 Md. 27; Broadway v. Buxton, 43 Conn. 282; Wilcox v. Lucas, 121 Mass. 21; O'Neil v. Teague, 8 Ala. 345; Webster v. Harris, 16 Ohio, 490.

[5] As where the land is so inaccurately described as to render its identity wholly uncertain. Campbell v. Johnson, 44 Mo. 247.

[6] Palmer v. Converse, 60 Ill. 313; Ewing v. Sandoval, etc. Co. 110 Ill. 290; McTucker v. Taggart, 29 Iowa, 478; Showman v. Miller, 6 Md. 485; Smith v. Allis, 52 Wis. 337.

[7] Oswald v. Sproehnle, 16 Ill. App. 368.

[8] Douglas v. Grant, 12 Ill. App. 273; Wilson v. Land Co. 77 N. C. 445.

[9] Nicoll v. Mason, 49 Ill. 358; Northwestern Mut. Life Ins. Co. v. Nelson, 103 U. S. 549; Veazie v. Williams, 8 How. (U. S.) 157; Adair v. Adair, 38 Ga. 49.

extreme to overturn vested titles on vague, loose testimony as to mere inferences, while such a practice would have the effect to render titles to real estate insecure, and defeat, in a great measure, the object of the statute, which requires title to land to be evidenced by writing.[1] The law, therefore, requires convincing proof to support a charge of mistake in a deed;[2] and the burden rests upon the moving party of overcoming the strong presumption arising from the terms of the instrument.[3]

When the transaction is remote, and when, from its ancient character, many circumstances attending the same must have faded from the most tenacious memory, the foregoing rules apply with redoubled force.[4]

§ 3. **Of contracts.** The right of correction and reformation is not confined to deeds or other instruments of a final and definite character; for the same principles which permit the enlargement of the scope and extension of the operation of instruments which have actually conveyed title apply with equal, if not stronger, force to mere executory contracts which do not disturb the legal title.[5]

But before equity will relieve against a mistake in a written contract, it must appear by clear and convincing proof that a mistake has been made[6] — that the true intention of the parties was different from the contract as reduced to writing. If the parties intended to insert words which were by accident omitted, or if words were inserted which they did not intend, then equity can reform the contract by inserting the omitted words on the one hand or expunging the redundant ones on the other.[7] But if the contract as shown by the writing contains only what they intended, and the words employed are

[1] Nicoll v. Mason, 49 Ill. 358; Taylor v. Baldwin, 10 Barb. (N. Y.) 585; Arnold v. Fowler, 44 Ala. 168.

[2] Shepard v. Shepard, 36 Mich. 179; Gillespie v. Moon, 2 Johns. Ch. 585; Manzy v. Sellars, 26 Grat. (Va.) 646.

[3] McTucker v. Taggart, 29 Iowa, 478; Rowley v. Flannelly, 20 N. J. Eq. 385; McDonnell v. Milholland, 48 Md. 540; Weidebusch v. Hartenstein, 12 W. Va. 760.

[4] Nicoll v. Mason, 49 Ill. 358.

[5] Craig v. Kittredge, 23 N. H. 231; De Peyster v. Hasbrouck, 11 N. Y. 582. And see Provost v. Rebman, 21 Iowa, 419; Hunter v. Bilyeu, 30 Ill. 228; Leitensdorfer v. Delphy, 15 Mo. 160; Chamberlain v. Thompson, 10 Conn. 244.

[6] McCormack v. Sage, 87 Ill. 484.

[7] Sibert v. McAvoy, 15 Ill. 106; Greer v. Caldwell, 14 Ga. 215; Smith v. Jordan, 13 Minn. 271.

the same as they supposed they were when the writing was signed, unless there has been some fraudulent artifice or misrepresentation, the fact that they have been mistaken in the meaning of the words, or that they understood them to be different from their legal effect, cannot be urged as a ground of reformation as for mistake.[1] As a rule, parties are presumed to have understood the legal effect of their writings;[2] and if the proofs are doubtful and unsatisfactory, if there is a failure to overcome this presumption by testimony entirely plain and convincing beyond a reasonable controversy, the writing will be held to express correctly the intention of the parties.[3]

§ 4. **Of voluntary conveyances.** It has long been the practice in equity to refuse aid in the case of a voluntary conveyance, and it would seem to be the established rule that the jurisdiction to reform deeds will not be exercised unless the transaction is based on a valuable or meritorious consideration.[4]

§ 5. **Deeds of married women.** Formerly, reformation was not permitted of the deeds of a married woman,[5] and such may still be the rule in some states; but the effect of recent legislation has been to annul the old doctrine relative to the contracts of this class of parties, and to practically place them upon the level of all other parties who contract *sui juris*. Under these enabling statutes mistakes in the deeds and conveyances of a married woman may be corrected in equity the same as if she were *sole*.[6] A deed executed by a woman while *sole* may be corrected after her subsequent marriage for a mistake in the description of the premises conveyed.[7]

§ 6. **Defective execution.** Reformation cannot ordinarily be had of a deed void at law by reason of defective execution. Effect is often given to such instruments as executory contracts, and in proper cases specific enforcement may be had,

[1] Coffing v. Taylor, 16 Ill. 457: Sibert v. McAvoy, 15 Ill. 106.

[2] Sutherland v. Sutherland, 69 Ill. 481.

[3] Northwestern, etc. Ins. Co. v. Nelson, 103 U. S. 549.

[4] Day v. Day, 84 N. C. 408; Preston v. Williams, 81 Ill. 176. A conveyance to one's grandchildren in consideration of love and affection is a voluntary conveyance, which equity will not correct by inserting words omitted through inadvertence. Powell v. Morrisey, 98 N. C. 426.

[5] Holland v. Moon, 39 Ark. 120.

[6] Bradshaw v. Atkins, 110 Ill. 323. And see Gardner v. Moore, 75 Ala. 394; Styers v. Robbins, 76 Ind. 517.

[7] Evans v. Aldrich, 63 Ill. 226.

but relief by way of reformation will be denied.[1] It has been held, however, in the case of a corporation that where the officers thereof, who are duly authorized to execute a deed of its property, undertake to do so, but execute it in their own names for the corporation instead of in the name of the corporation, equity has power to and will reform the deed and make it conform to the agreement of the parties.[2]

§ 7. **Clerical errors and omissions.** Palpable errors resulting from evident negligent omission or transposition of words, or words evidently misplaced through inadvertence, as well as words improperly employed when read in connection with the other parts of the instrument, may be and often are corrected without introducing any parol testimony to show mistake.[3] Clerical errors may ordinarily be shown by parol, however, or with the assistance of documentary proof, and when such errors are made to appear correction may be had by a reformation of the instrument.[4]

[1] In Goodman v. Randall, 44 Conn. 321, the facts were as follows: A mortgage drawn for the purpose of securing to A. a debt due him was formally witnessed and acknowledged, but by accident was not signed by the mortgagor. In this form it was delivered to A. and recorded. On the same day the mortgagor conveyed the property to B., subject to the mortgage. On a bill in equity brought by A. against B. for a correction of the mortgage and to foreclose, *held*, that equity could not furnish the relief on the ground that the deed was defectively executed. Such relief could be furnished only by compelling a specific performance of the contract lying behind the deed, and the title thus conveyed or decreed would take effect only from the time of the decree, and would only be such title as the respondent might then have. In Lindley v. Smith, 58 Ill. 250, where a mistake occurred in the certificate of acknowledgment of a married woman to a deed of land to which she held the legal title, in that the magistrate omitted therefrom the statement that she "was personally known to him," etc., it was *held* that a court of chancery would not make that a conveyance which was not in itself a conveyance under the pretext of correcting a mistake. See also Hutchins v. Huggins, 59 Ill. 29.

[2] West v. Agricultural Board, 82 Ill. 205.

[3] A deed from which the seal was omitted, and also the words "grant, bargain and sell," or their equivalents, but which contained words of warranty, was held to be entitled to be so corrected. Michel v. Tinsley, 69 Me. 442. In the description of property the number of the lot and block and all other particulars were correctly given, except that the word "southwest" was used in one place by mistake for "southeast," making the description absurd. *Held*, that the deed should be reformed. Dayton v. Bank, 11 Ill. App. 501.

[4] As where the parties intended to mortgage the northeast quarter of a

§ 8. **Parties.** As a rule, reformation is only granted to purchasers for value; and, as a court of equity will refuse its aid to decree a specific performance of a purely voluntary contract, so will it decline to rectify a mistake in a contract that is voluntary and without any consideration to support it.[1] But this rule does not apply to a dispute between two volunteers, claiming under the same deed, where the grantor has no interest in the controversy.[2] Nor does the rule apply to third persons claiming legal rights under a volunteer; as where a mistake has occurred in the description of the premises in a deed given in consideration of love and affection only, and the grantee, on the faith of such deed, has gone into possession and made improvements, and thereafter mortgaged the property for a valuable consideration, the mortgagee may maintain a bill for the correction of such mistake against the grantor or his heirs, or purchasers from them without consideration.[3] Again, if in addition to a purely meritorious consideration, as "love and affection," there is a valuable consideration, however small, as "of the sum of one dollar, and natural love and affection," the grantee is a purchaser for value, so far that he may maintain an action against the grantor or his heirs to reform such deed by correcting a mistake made in the description of the land intended to be conveyed.[4]

Correction of a deed can never be had without showing that the complainant holds under it,[5] yet it is not necessary in all cases that the party complaining should be an immediate grantee; and where an error of description has been copied in a series of deeds, under circumstances that would entitle each grantee to a reformation as against his vendor, the last grantee will be entitled to a reformation as against the original grantor.[6] The rule is imperative, however, that one demanding the reformation of a deed must show himself to be in some

section, and by mistake of the draughtsman it was described as the northwest, *held*, that it was a mistake relievable in equity. Sowler v. Day, 58 Iowa, 252.

[1] Preston v. Williams, 81 Ill. 176; Petesch v. Hambach, 48 Wis. 443; Mulock v. Mulock, 31 N. J. Eq. 594; Mason v. Moulden, 58 Ind. 1.

[2] Adair v. McDonald, 42 Ga. 506.

[3] And the fact that the mistake might have been discovered by a careful inspection of the record is immaterial. Cummings v. Freer, 26 Mich. 128.

[4] Mason v. Moulden, 58 Ind. 1.

[5] Ballentine v. Clark, 38 Mich. 395.

[6] Blackburn v. Randolph, 33 Ark. 119.

way a privy to the transaction wherein the same was made, and the action will never lie at the suit of a stranger.[1]

§ 9. **Subsequent purchasers.** A deed may be reformed not only as between the parties, but as against all others who may have acquired interests in the property with notice that an error has been made, or even those who, without such notice, take only as volunteers.[2] Thus, it is sufficient to authorize the reformation of a deed for a mistake as against a subsequent grantee that he had notice of the first deed, and the fact that by a mistake it failed to properly describe the land or the interest intended to be conveyed, and such purchaser will not be permitted to profit by the mistake.[3] Yet where a party seeks to effect a reformation as against a subsequent purchaser, on the ground of mistake either as to the property or estate, and notice to such subsequent purchaser, he must establish the facts relied on for relief with clearness and certainty.[4]

As against a subsequent *bona fide* purchaser for value and without notice, the action will not lie; yet the rule exempting such purchaser is strictly applied, and parties must bring themselves fully within its requirements in order to claim its benefits. A judgment creditor, it seems, is not such a purchaser,[5] nor one who purchases at execution sale.[6]

§ 10. **Judgment creditors.** Equity will not allow the lien of a judgment to be enforced against a vendee who has purchased before the recovery of such judgment; nor will it protect a purchaser under the same who had notice of the equitable rights of the original vendee. In pursuance of this principle it has frequently been held that where mistakes have been made in the description of the land or character of the estate conveyed — as where a purchaser has received a deed from which a portion of the land intended to be conveyed has been

[1] Willis v. Saunders, 51 N. Y. Sup. Ct. 384.

[2] Kilpatrick v. Strozier, 67 Ga. 247.

[3] Preston v. Williams, 81 Ill. 176.

[4] Peck v. Arehart, 95 Ill. 113.

[5] Lowe v. Allen, 68 Ga. 225; Dayton v. Bank, 11 Ill. App. 501.

[6] Lands, by mistake, were erroneously described in a conveyance, and the lands which it was intended to convey were sold on execution against the vendor. *Held*, that the equitable claim of the grantee under the first conveyance to have the mistake corrected, being prior in time to the claim of the purchaser under the execution, should be enforced as against the claim of the latter. Carver v. Lassallette, 57 Wis. 232.

omitted by mistake, or where, for the same reason, different land has been conveyed from that intended and contracted for — the purchaser may maintain a bill against a judgment creditor of the grantor to displace the apparent lien and to correct the mistake.[1]

Where the purchaser of land goes into possession and exercises acts of ownership over it, such possession is notice to one afterward obtaining a judgment against his grantor of his equitable title, although by mistake in his deed another piece of land was described instead of that purchased; and a court of equity will enjoin such judgment creditor from selling the land on execution, and will correct the mistake in the deed.[2]

§ 11. **For mutual mistake.** An action may be maintained in equity for the rescission of a contract upon the ground of mistake as to a material fact by one of the parties only; yet it must be evident that if the minds of the parties to a contract did not meet — that if one understood the matter as expressed in the agreement and the other differently — there can be no reformation from the very nature of things, because, nothing having been agreed upon in the minds of the parties, there is nothing to reform.[3] Therefore, to authorize a reformation the misunderstanding must have been mutual;[4] and a rectification will only be permitted where both parties have executed the instrument under a common mistake, and have done what neither of them intended.[5] In every case it must clearly and satisfactorily ap-

[1] Willis v. Gattman, 53 Mich. 731; Wall v. Arrington, 13 Ga. 88; Gouverneur v. Titus, 6 Paige (N. Y.), 347; Carver v. Lassallette, 57 Wis. 232.

[2] Lumbard v. Abbey, 73 Ill. 177.

[3] Sawyer v. Hovey, 3 Allen (Mass.), 331; Jackson v. Andrews, 59 N. Y. 244.

[4] Mills v. Lewis, 55 Barb. (N. Y.) 179; Emery v. Mohler, 69 Ill. 221; Andrews v. Essex Ins. Co. 3 Mason (C. Ct.), 10; Stockbridge Iron Co. v. Hudson Iron Co. 102 Mass. 48; Nevius v. Dunlap, 33 N. Y. 676; Ludington v. Ford, 33 Mich. 123. As was remarked by Ames, J., in Dinman v. R. R. Co. 5 R. I. 130, if a court were to reform the writing to make it accord with the intent of one party only to the agreement, who averred and proved that he signed it, as it was written, by mistake, when it exactly expressed the agreement as understood by the other party, the writing when so altered would be just as far from expressing the agreement of the parties as it was before; and the court would be engaged in the singular office, for a court of equity, of doing right to one party at the expense of a precisely equal wrong to the other.

[5] Sutherland v. Sutherland, 69 Ill. 481; German Am. Ins. Co. v. Davis,

pear that the precise terms of the contract had been orally agreed upon, and that the writing afterward signed fails to be, as it was intended, an execution of such previous agreement, but on the contrary expresses a different contract; and that this is the result of mutual mistake.[1] But if there had been misunderstandings between the parties during the negotiations, and if the parties understood the agreement differently, yet neither made known to the other his construction of it, and it is afterward reduced to writing and duly executed, they are both bound in equity as well as at law by the terms of the written instrument.[2]

A party who files a bill to correct a mistake in a written agreement, in a case where the court has the power to make a correction therein, must not only state in his bill the agreement as it ought to have been, reduced to writing, but also the substance of the written agreement itself. The party alleging the mistake holds the affirmative, and must satisfy the court beyond a reasonable doubt that the agreement, as he claims it to have been made, was in fact made between the parties, and that a mistake has occurred in reducing such agreement to writing.[3]

§ 12. **Continued — For mistake of one party only.** The general statement of the preceding paragraph, that to authorize the interposition of a court of equity in a matter of reformation there must be mutual error, embodies the opinions of all the elementary writers, and is sustained by a vast volume of judicial authority. The cases where this general statement is made are very numerous, and it is well said that to exercise this power, where one party only has been in error and the other has correctly understood it, would be making a new contract for the parties, and would be doing injustice to the party who made no mistake. An important distinction, however, has been made in later cases, which to some extent modifies the rule as first stated. It will be found that in those cases where the rule has been applied and enforced there is an

131 Mass. 317; Durant v. Bacot, 13 N. J. Ch. 201; Nevius v. Dunlap, 33 N. Y. 676.

[1] Clark v. Higgins, 132 Mass. 590; Shay v. Pettes, 35 Ill. 360.

[2] Miller v. Lord, 11 Pick. (Mass.) 24.

[3] Coles v. Bowne, 10 Paige (N. Y.), 526; Stockbridge Iron Co. v. Hudson Iron Co. 102 Mass. 45.

element of honesty on the part of the one correctly understanding the contract; and because the parties have fairly entered into the contract it cannot be amended, as against the party correctly understanding it, he acting in good faith, and supposing the other to have understood the contract as he did. But where there has been a mistake on one side and fraud upon the other; where the guilty party, though not mistaken himself, well understood the other party's error, and knowing the same executed the contract intending to reap advantage from such error, while the mistake is unilateral, yet the fraud of the other party will justify equitable intervention equally as though such guilty party had made affirmative representations to induce the error.[1]

The general rule, however, is as first stated, and a mistake of only one of the parties to an instrument will not justify a reformation of it so as to impose upon the other party obligations which he never intended to assume, or bind him to do or to receive what he never contracted for or contemplated.[2]

But while the instrument will not be reformed so as to effect such consequences, it may be rescinded or canceled for the mistake of only one of the parties, provided there can be a restoration of the parties to their original condition.[3]

§ 13. **Mistake occasioned by fraud.** Where either of the parties to an agreement is under a mistake, whether of the facts or the stipulations produced by the fraud, deceit or imposition of the other, and the mistake is made to appear by clear and competent testimony, equity will unhesitatingly afford the necessary relief by reforming the writing or canceling it as the case may require.[4] But not every species of

[1] As where a deed was delivered to the defendant, which, by mistake on the part of the plaintiff, failed to contain a reservation of valuable rights. The defendant was aware of the plaintiff's mistake, and received the deed knowing that the plaintiff supposed that the reservation had been made. Welles v. Yates, 44 N. Y. 525.

[2] Moran v. McLarty, 75 N. Y. 25.

[3] Benson v. Markoe, 37 Minn. 30; Dulany v. Rogers, 50 Md. 524; Brown v. Lamphear, 35 Vt. 252; Jackson v. Andrews, 59 N. Y. 244.

[4] Kennerty v. Etiwan Phosphate Co. 21 S. C. 226; Welles v. Yates, 44 N. Y. 525; Summers v. Coleman, 80 Mo. 488. Equity will reform a deed which has been accepted by the grantee in ignorance of the fact that, after the parties had agreed upon and stated the terms to the conveyancer, the grantor caused different terms to

fraud is available for this purpose, and cases will frequently arise where the right to a rescission or cancellation is undoubted, yet a court would have no power to alter or reform the agreement as made. Thus, a bill will not lie to reform a written instrument where the only evidence of a mutual mistake is that complainant, being unable to understand English, relied upon statements of the defendant as to the meaning of the document which were untrue. If the instrument was written just as agreed upon, and just as the parties understood and intended it should be, while it might be annulled for fraud it could not be reformed for mistake.[1]

§ 14. Mistake resulting from negligence. Where one of the parties only is under a mistake, and this has occurred from no fault of the other, but solely by the negligence or inattention of the first party, equity will refuse to aid,[2] except under very strong and extraordinary circumstances, showing something which would make it a great wrong to enforce the instrument.[3] This exception might arise in case of imbecility, or where the mistaken party was laboring under some disability of mind or body, and probably where he was unable to read if concealment had been practiced upon him; but a party fully competent to protect himself, under no disability, advised as to all the circumstances by which he may be saved in his rights, or in a situation where he might by due diligence be so advised, not overreached by fraud, concealment or misapprehension, has no right to call upon courts for protection from the result of his own neglect or want of attention.[4]

So, where a party previous to executing a written instru-

be inserted. Bergen v. Ebey, 88 Ill. 269. And see O'Neil v. Teague, 8 Ala. 345.

[1] Fehlberg v. Cosine, 13 Atl. Rep. (R. I.) 110.

[2] Bonney v. Stoughton, 122 Ill. 536.

[3] Nevius v. Dunlap, 33 N. Y. 676; Kennerty v. Etiwan Phosphate Co. 21 S. C. 226; Brown v. Fagan, 70 Mo. 421; Toops v. Snyder, 70 Ind. 554; Webster v. Stark, 10 Lea (Tenn.), 406.

[4] Murrel v. Murrel, 2 Strob. Eq. (S. C.) 148. Equity will not reform a deed for misdescription of the land conveyed, where the misdescription is the result of carelessness in not procuring correct descriptions. Toops v. Snyder, 70 Ind. 554. Where a person desiring to buy two adjacent lots, upon one of which a mill stood, made a mistake as to the location of the mill, and consequently contracted for different lots, *held*, that the contract could not be reformed. Webster v. Stark, 10 Lea (Tenn.), 406.

ment has full opportunity to examine it so as to know its contents, yet voluntarily signs without making such examination, he cannot claim a reformation of the agreement simply upon evidence that it contains obligations he was not cognizant of and did not intend to agree to.[1]

§ 15. **Mistake of the draughtsman.** The general principles of equity applicable to this question all confirm the doctrine that where an instrument is drawn and executed which professes or is intended to carry into execution an agreement, whether in writing or parol, previously entered into, but which by mistake of the draughtsman, either as to fact or law, does not fulfill or which violates the manifest intention of the parties, equity will correct the mistake so as to produce a conformity of the instrument to the agreement.[2] Yet, as before remarked, the principle upon which courts of equity thus interpose to afford relief is one of great strictness, and is never applied except upon a most complete and satisfactory showing. Where the proof is of such a character as to leave no doubt whatever in the mind of the court that mistake has intervened, and the instrument sought to be rectified is variant from the actual contract of the parties, the instrument will ordinarily be so amended as to make it conform to their real intention. But in such cases it is not enough to show the intention of one of the parties to the instrument only: the proof must establish incontrovertibly that the error or mistake al-

[1] Moran v. McLarty, 75 N. Y. 25.

[2] Lant's Appeal, 35 Pa. St. 279; Hunt v. Rousmanier's Adm'r, 1 Pet. (U. S.) 13; Leitensdorfer v. Delphy, 15 Mo. 160; Cassidy v. Metcalf, 66 Mo. 529; Worden v. Williams, 24 Ill. 67; Clearwater v. Kimler, 43 Ill. 272; Stines v. Hays, 36 N. J. Eq. 361; Sowler v. Day, 58 Iowa, 252. Where by mistake of one preparing a deed the grantee's husband's name was inserted with the grantee's, reformation was permitted. Courtright v. Courtright, 63 Iowa, 356. In Cooke v. Husbands, 11 Md. 492, a deed was executed which, by mistake of the draughtsman as to its legal effect, conveyed a greater interest than was intended by the parties. Relief was granted. Stedwell v. Anderson, 21 Conn. 139, was a case where several sisters owning land jointly attempted with their respective husbands to make partition by deed. One of the husbands, who drew the deeds, by mistake and ignorance as to the proper form, made the husbands grantees with their wives, thus conveying a fee to the husbands, contrary to the intention of the parties. In this action, many years afterwards, relief was afforded. And see Clayton v. Freet, 10 Ohio St. 544.

leged was common to both parties; in other words, it must be conclusively established that both parties understood the contract as it is alleged it ought to have been expressed, and as in fact it was, but for the mistake of the draughtsman in reducing it to writing. Under no circumstances can a court assume to rectify an instrument by adding to it a term or provision which had not been agreed upon, though it may afterwards appear very expedient or proper that it should have been incorporated. In deciding cases of this nature, great weight must be given to what is reasonably and properly sworn to on the part of the defendant; because it must be a very strong case that would, even in a recent transaction, operate to overturn or vary a solemn instrument, while after the lapse of a long time the evidence must be such as shall leave no sort of reasonable doubt in the mind of the court; and more especially is this so where not only considerable time has elapsed, but the parties to the original transaction have died before application is made for relief.[1]

It is, however, a well-settled principle of equity, often recognized and applied, that wherever a person has the legal right to dispose of property and means to do so, the form of the instrument, if at law ineffectual, will be disregarded and it will be reformed so as to be made effectual; and so where, by the plain mistake of the scrivener, an instrument which should have been a deed or declaration of trust is drawn in the form of a will, it is within the power of a court of equity to correct the mistake, to reform the instrument, and to decree it to be such as it ought to have been so as effectually to carry out the intention of the parties.[2]

§ 16. Mistakes of law. As previously stated, it is a general rule that a mistake of law is not a ground for reforming a deed or contract founded upon such mistake, and the rule is usually strictly enforced whenever it is invoked.[3] It will readily be seen, however, that the rigid enforcement of such rule

[1] Showman v. Miller, 6 Md. 485; Gillespie v. Moon, 2 Johns. Ch. (N. Y.) 585.

[2] Lant's Appeal, 35 Pa. St. 279.

[3] Lyon v. Richmond, 2 Johns. Ch. (N. Y.) 51; Peters v. Florence, 38 Pa. St. 194; Lyon v. Sanders, 23 Miss. 530; Mellish v. Robertson, 25 Vt. 603; Gwynn v. Hamilton, 29 Ala. 233; Bryant v. Mansfield, 22 Me. 360; Smith v. McDougal, 2 Cal. 586; Toops v. Snyder, 70 Ind. 554.

must, under certain circumstances, work great hardship; and, as this is something to which the whole theory of equity jurisprudence is violently opposed, it cannot be said to be either an inflexible or invariable rule, nor that there may not be cases in which a court of equity will relieve against a plain mistake arising from ignorance of law.[1] On the contrary, it is now conceded that an admitted or clearly established misapprehension of law does create a basis for equitable interference which may be exercised in unquestioned and flagrant cases, and that the power of courts of equity to afford relief from the consequences of the mistakes of parties to written instruments is not strictly limited to mistakes of fact. While for a bare mistake of law alone, without other considerations affecting the case, relief will rarely if ever be afforded, yet equity will and does interfere where it further appears that the defendant, availing himself of the opportunities afforded by the mistake, will take an unconscionable advantage of the plaintiff, without consideration — the plaintiff being blameless and the defendant in no position entitling him to equitable protection.[2]

It may be safely asserted, therefore, that courts of equity, in cases similar to those under consideration, are not limited to affording relief by way of reformation only in case of mistake of fact, and that a mistake in the legal effect of a description in a deed or in the use of technical language may be relieved against upon proper proof.[3] That when property has been

[1] Hunt v. Rousmanier, 1 Pet. (U. S.) 1; Underwood v. Brockman, 4 Dana (Ky.), 314; Benson v. Markoe, 33 N. W. Rep. (Minn.) 38.

[2] As where the plaintiff, who had sold certain real estate to the defendant's grantor and executed a deed of conveyance, taking back a mortgage for the price ($12,000), was afterwards requested by the grantee to execute to him a further deed of release and quitclaim of the premises for the purpose of effectually conveying certain land which, as was represented, had not been transferred by the prior deed. The plaintiff executed the quitclaim and release without consideration, thereby in legal effect, but contrary to his intention, discharging his mortgage. *Held*, that the plaintiff is entitled to relief limiting the operation of the latter deed to the conveyance of the premises, the defendant having acquired his title with knowledge of the plaintiff's equity. Benson v. Markoe, 37 Minn. 30. And see Hunt v. Rousmanier, 1 Pet. (U. S.) 1; Jones v. Munroe, 32 Ga. 188; Stover v. Poole, 67 Me. 217; Pitcher v. Hennessy, 48 N. Y. 415; Green v. R'y Co. 12 N. J. Eq. 165; Baker v. Massey, 50 Iowa, 399.

[3] Canedy v. Marcy, 13 Gray (Mass.), 373.

conveyed through mistake which the parties never intended should be conveyed, which the grantor was under no legal or moral obligation to convey, and which the grantee in good conscience has no right to retain, a court of chancery will interfere and correct the mistake whether it arose from a misapprehension of the facts or the legal operation of the deed.[1]

But the exceptions to the rule, if indeed they can properly be classed as such, are very few in number, and always have something peculiar in their character involving other grounds of decision. Many, though not all, of the cases in which the question has been presented have turned upon an admixture of other ingredients tending to show fraud, imposition, undue influence or some other circumstance for which courts of equity uniformly grant relief.[2] Thus, it has been held that where one acting in ignorance of a settled principle of law has been induced to give up his undisputed property under the form of a compromise, equity may grant relief upon the theory that there has been some imposition practiced or confidence abused, in which case the mistake of law is not taken as the foundation of relief, but as evidence tending to establish some other proper ground.[3] Where, therefore, the written instrument does not effect that which the parties intended or had previously agreed upon, and there is no laches on the part of the party in discovering and alleging the mistake, equity will lay hold of any additional circumstances fully established which will justify its interposition to prevent marked injustice being done.[4]

It will be observed also that where parties have made an agreement in which there is no allegation of mistake, but, in reducing it to writing, they by mistake, either because they

[1] Stedwell v. Anderson, 21 Conn. 139.

[2] Whelen's Appeal, 70 Pa. St. 410; Jordan v. Stevens, 51 Me. 81; Hurd v. Hall, 12 Wis. 124.

[3] But this result will not follow in case of an erroneous exercise of judgment in regard to legal principles, even where they are in doubt; as where at the time a deed was made there were several contemporaneous decisions as to the effect of such deed, which were in opposition to previous decisions, and which were subsequently overruled. *Held*, that the mistake of the parties to the deed was one of law, which could not be corrected. Kelly v. Turner, 74 Ala. 513.

[4] See Stedwell v. Anderson, 21 Conn. 139; Clayton v. Freet, 10 Ohio St. 544; Remington v. Higgins, 54 Cal. 620; Larkins v. Biddle, 21 Ala. 252.

did not understand the meaning of the words used or their legal effect, failed to embody their intention in the instrument, equity will grant relief by way of reformation, compelling the parties to execute and perform their agreement as they made it. In such case it is of no consequence whether the mistake be called one of law or fact.[1] And usually, when a mistake appears, and it is doubtful whether it be one of law or fact, courts will presume it to be a mistake of fact until it is shown that all the facts were known.[2]

Thus, while the power of courts of equity to afford relief from the consequences of the mutual mistakes of parties to written instruments is not strictly limited to cases of mistake of fact, but extends also to mistakes of law, yet the jurisdiction will be exercised with caution, and only very clear and convincing proofs will be sufficient to overcome the presumption that the written instruments which the parties have executed for the purpose of evidencing and carrying into operation their agreement are in legal effect or in terms contrary to their intention.[3]

§ 17. **Mistake as to estate.** A mutual mistake as to the estate to be conveyed may be corrected in equity by reformation; but in this, as in the other cases where equitable interference is sought, the evidence must be of the clearest character. This is one of the cases where mistakes of law most frequently occur, induced by an incorrect understanding of the import of the language employed. Words inserted intentionally cannot be changed on the ground that one party misunderstood their meaning or effect, or that they conflict with a contemporaneous parol agreement;[4] and however mistaken the parties may have been they are usually without redress so far as this remedy is concerned.

A deed will be reformed in order to give effect to the intention of the parties, where through mistake the whole of premises are conveyed upon trusts, when the intention was to convey only one portion on trusts and the remainder in fee-simple.[5] So also equity will relieve where one, whether by

[1] Pitcher v. Hennessy, 48 N. Y. 415.

[2] Hurd v. Hall, 12 Wis. 124.

[3] Benson v. Markoe, 37 Minn. 30.

[4] Barnes v. Bartlett, 47 Ind. 98.

[5] Kirk v. Zell, 1 MacArthur (Dist. Col.), 116.

fraud or mistake, obtains a conveyance in fee from one believing himself to be executing a conveyance for life;[1] or where, through mistake and ignorance as to the proper form, an estate different from the one intended is conveyed.[2] Erroneous omissions of the draughtsman in respect to the estate also constitute such a mistake as a court of equity will relieve against.[3]

§ 18. Mistakes as to identity of property. One of the most familiar illustrations of the power of equity to grant relief for mistake occurs where parties bargain for one parcel of land, and by mistake another and different parcel is conveyed. In such cases, where mutual mistake is clearly shown, equity will decree a reformation of the deed at the suit of either party.[4] In every such instance, however, due regard must be had for the rights of all the original parties, and for those of third parties whose interests shall have intervened subsequent to the transfer. Hence, relief prayed by a bill to rectify a deed whereby, through the mutual mistake of the parties, a different lot was conveyed from that intended, can only be

[1] Summers v. Coleman, 80 Mo. 488.

[2] As where parties were shown to have intended the conveyance of lands to a wife for life, with remainder to her children. By ignorance and mistake the deed was made conveying the premises to the wife and to her heirs, the parties supposing such a deed would have the desired effect. *Held*, in a suit for correction, that relief would be granted, although the mistake was one of law. Clayton v. Freet, 10 Ohio St. 544.

[3] As where an attorney, in drawing a deed by which a father conveys a life estate to his daughter, neglects to insert "for her sole and separate benefit." Stone v. Hale, 17 Ala. 557.

[4] Burr v. Hutchinson, 61 Me. 514. A., the owner of lots 30 and 44, conveyed to B. lots 30 and 42, intending to convey lots 30 and 44. B. took possession of lots 30 and 44 and continued so for several years when A., discovering his mistake conveyed to C., with notice, lot 44. *Held*, that B. might have his deed from A. reformed. Johnson v. Johnson, 8 Baxter (Tenn.), 261. So also where, under a perfect deed of lot 81, conveyed upon consideration of $1, the grantee occupied an adjoining lot (86) only worth that sum, which it was using at the time as a graveyard, and which the parties supposed was conveyed for over fifty years, the grantee never asserting any claim to lot 81, which was much more valuable, and which was occupied by descendants of the grantor, *held*, that equity would correct the mistake and confirm title to lot 86 in the grantee. Skerrett v. Presbyterian Society, 41 Ohio St. 606. Where the owner of a definite tract of land made a parol contract to convey the same, but through mistake the deed was of the "southeast" instead of "middle" division, and the boundaries were entirely omitted, *held*, that the mistake was one of fact and subject to correction. Morrison v. Collier, 79 Ind. 417.

granted by transferring to the right property any incumbrances that may have been put on the property actually conveyed.[1]

Where there is a misdescription in a deed of the land intended to be conveyed, or where a different parcel has been transferred under a mistake as to identity, equity will order a proper conveyance, and in such case the grantee in the erroneous deed must tender, and should be required to return, the title erroneously received by him.[2]

Reformation may also be had of deeds containing designated descriptions whereby a mistake is made with regard to the quantity or extent of the land included in such description by designation.[3]

§ 19. Description with definite quantity. Where land is sold as of specific quantity, or, as usually termed, by the acre, and the consideration is regulated or fixed by the acreage, a much less variation from the quantity intended to be conveyed would afford evidence of a mistake which would justify the interposition of a court to correct it than would be sufficient for that purpose in a sale by any other description. But even in a sale per acre, if from the roughness or unevenness of the ground, from the variation of the instruments and from the different results that would necessarily be produced by different surveyors operating with the same instruments, it is impracticable to ascertain the quantity with perfect precision, a small deficit or surplus would not justify an application for relief.

[1] Weston v. Wilson, 31 N. J. Eq. 51.

[2] McLennan v. Johnston, 60 Ill. 306. In Parker v. Benjamin, 53 Ill. 255, a party owning two forty-acre tracts sold one of them and executed a deed therefor. The purchaser, from a mistaken idea that the deed was not for the tract he had bought, refused to receive it, and thereupon the vendor conveyed to him the other tract. The vendee then discovered that the deed he had received was for the wrong tract, and that the one first executed was correct. Upon the vendor refusing to correct that mistake, *held*, that equity would compel him to do it on receiving back the title he had made.

[3] A bill in equity will lie to reform a deed where it alleges that at the time it was made it was "fully understood, and it was agreed," between the parties to the deed, that the term "Loop," used in the deed to describe the lands conveyed, included and embraced certain lands which the vendee afterwards found were not generally understood to be known and described as contained in the "Loop." Fudge v. Payne (Va.), 10 S. E. Rep. 7.

§ 20. Description without specification of quantity. It seems that the conveyance of a particular tract without specification of quantity does not bind the vendor to warrant the particular number of acres, although there may have been an expectation in both parties, founded even upon documents and other evidence known to both, that the number of acres would be greater than subsequently appears on survey;[1] nor can such mutual expectation be made the basis of a suit for reformation.

§ 21. Description with estimated quantity. Where land is sold as a specific tract by name or description, each party is ordinarily presumed to take the risk of quantity. In cases of this kind there is usually nothing that will justify the interference of a court of equity for the purpose of correction. Where in connection with such a description there is a specification of quantity, but qualified with the usual formula, "more or less," the plain and obvious meaning of such words is generally taken to be that the parties were to run the risk of gain or loss as there might happen to be an excess or deficiency in the estimated quantity.[2] Indeed, this is the sense in which such an expression is uniformly understood by both the learned and the unlearned. Nor is this idea repelled by the expression of the quantity of acres, but, on the contrary, it rather derives strength from the manner in which the quantity is mentioned; for it plainly indicates that the expression of quantity was used as a matter of description only, and that it was the intention of the parties not to be confined to a precise and specific quantity. There may be cases of this kind, however, where the surplus or deficiency may be so great as to authorize an inference that it has been produced by fraud or mistake.

§ 22. False enumeration of quantity. Where land is sold at a fixed price per acre, and the quantity is misrepresented, though without fraud on the part of the vendor, a court of equity will relieve the party injured by the mistake. The purchaser would have the privilege of taking the land at the price of the real number of acres, or, if he had paid for it, would be entitled to compensation for deficiency.[3]

[1] Moore v. Vick, 2 How. (Miss.) 746.

[2] Faure v. Martin, 7 N. Y. 210; Canal Co. v. Emmett, 9 Paige (N. Y.), 168.

[3] Stebbins v. Eddy, 4 Mass. 414.

§ 23. Mistake induced by misrepresentation. Equity will always afford relief against mistakes produced by misrepresentation, whether fraudulent or otherwise. Thus, where land conveyed with covenants was described in the deed as bounded on one side by land of an adjoining proprietor, and the grantor, during the negotiation and before the deed was given, showed to the grantee what he then stated to be the divisional line, which proved afterward to be beyond the true line and within the land of the adjoining proprietor, making the land conveyed less in extent than represented, it was held that the remedy of the grantee was wholly by a proceeding in equity to correct the deed, and not by an action on the covenants.[1] A mistake of this kind may always be shown by parol,[2] while the liability of a covenantor must depend upon a fair construction of the deed itself, and cannot be enlarged or varied by evidence *aliunde*.

§ 24. Mistake of law induced by misrepresentation. While ignorance of law, whether by a resident or non-resident contracting party, will, as a rule, afford no ground for relief, all men being bound at their peril to know the laws of the country on the basis of which they deal, it has nevertheless been held that mistake as to the legal effect of a written agreement, produced by the misrepresentations of the opposite party, is a proper subject of correction by a court of equity, and constitutes a ground of relief to the same extent as a mistake of fact,[3] and that the court in such case will carry into effect the intention of the parties, though the agreement fails to express it.[4] But while conceding this, it has been further held that the misrepresentation or mistake should only be available, as against the express terms of a conveyance, when it assumes the character of a contract or warranty, and that this should be the limit of the doctrine.[5]

§ 25. Grantee in default. An action for reformation will not lie at the suit of the grantee to compel a grantor to correct the errors in his deed so long as such grantee is in default

[1] Broadway v. Buxton, 43 Conn. 282.

[2] Bush v. Hicks, 2 Thomp. & C. (N. Y.) 356.

[3] Snyder v. May, 19 Pa. St. 238.

[4] Tyson v. Passmore, 2 Pa. St. 122.

[5] Zentmyer v. Mittower, 5 Pa. St. 410.

in payment of the purchase money;[1] and the same rule applies to one claiming under the grantee, unless circumstances exist to estop the original grantor from asserting his rights to insist on payment.[2] The rule is that a party praying the reformation of a deed must stand on some equity superior to that of the other party, and must show that he himself has fulfilled the contract of purchase.[3]

§ 26. As affected by delay. Relief in equity is granted only to the vigilant; and where a party sleeps upon his rights, and for any considerable length of time, after he has discovered that he has been injured, fails to seek redress, he will be deemed to have waived the injury. In the matter of reformation this rule applies with full force,[4] and a court of chancery will not, after a lapse of years, interfere to reform a deed except upon the most positive and satisfactory evidence of the intention of the parties at the time the deed was executed.[5] Circumstances will sometimes be permitted to modify this rule, and it has been held that a grantor's right to relief by reforming a deed describing the land as of more than actual width is not barred by lapse of time where he has remained in possession of the portion included by mistake;[6] and the same is true of a grantee who has entered into and remained in possession of the lands supposed to have been conveyed. Indeed, where

[1] McFadden v. Rogers, 70 Mo. 421.

[2] McFadden v. Rogers, 70 Mo. 421.

[3] Conaway v. Gore, 21 Kan. 725.

[4] Sable v. Maloney, 48 Wis. 331; Yocum v. Foreman, 14 Bush (Ky.), 494.

[5] Not after twenty-five years. Nicoll v. Mason, 49 Ill. 358. In Sable v. Maloney, 48 Wis. 331, a judgment reforming a deed was reversed for laches in failing to bring suit for nearly fifteen years after both parties to the deed had knowledge of the alleged mistake; the testimony also being conflicting. So in Yocum v. Foreman, 14 Bush (Ky.), 494, it was held that where an agreement reduced to writing had been treated by all the parties as the contract for nearly eleven years, without any discovery of a mistake in its terms, proof only of the admissions of one of the parties, with other proof contradicting its terms, cannot be held sufficient to authorize the court in holding that the mistake has been clearly established.

[6] Hutson v. Fumas, 31 Iowa, 154. Where land was to be conveyed to be used as a road and reserving to the grantor the right to use it as such, but, by mistake of the scrivener chosen by the grantee, the deed did not so read, and the grantor used the road from 1871 till 1881, when the grantee denied his right, the grantor not having discovered the mistake in the deed until 1879, *held*, that the deed should be reformed. Stines v. Hays, 36 N. J. Eq. 364.

parties are using or are in possession of premises supposing themselves to be legally entitled thereto under and by virtue of prior contracts, and such rights are subsequently denied by those who apparently possess the legal title, where such denial of rights grows out of an alleged mistake which until then had passed undiscovered, a delay in bringing suit will generally be excused.[1] So far as the right to exercise the discretion is concerned it does not seem that courts are bound by any limitation with respect to time; and it has been held that a court of equity may reform a deed in which a mistake was made in the description of the premises intended to be conveyed, after a lapse of more than twenty years from the date of its execution and after both parties to it are dead, where rights of third parties have not intervened.[2]

§ 27. As affected by the statute of frauds. The whole theory of reformation rests on the supposition of a prior contract differing from that which the parties subsequently executed, and, as a necessary deduction, the rule is established that a written instrument will be reformed for fraud, accident or mistake only so as to give effect to such previous agreement. The question then arises, How far, if at all, is this rule inconsistent with such reformation of an instrument where the executory agreement was oral and within the statute of frauds? It is greatly to be regretted that no positive answer can be made to this question that will hold good in every state. There are two lines of decision in apparent conflict, and between them some minor modifications; they appear to be, and indeed are, irreconcilable, and local law must furnish the rule wherever the point is to be decided.

The question may sometimes arise in cases where the written agreement as it stands is too broad, including more than was originally intended; but with respect to this class of cases the authorities are more uniform, and parol evidence is permitted to correct and reform; but where the written agreement is too narrow, where it fails to embody all the elements

[1] So held where, by mutual mistake, a deed failed to reserve a right of way, which, however, was used for many years, with consent of defendant, till he forbade the use, when plaintiffs discovered the mistake in the deed and immediately brought suit to have it reformed. Schautz v. Keener, 87 Ind. 258.

[2] Lindsey v. Davenport, 18 Ill. 375.

of the original contract, the authorities are in decided conflict.[1]

While in one sense and for certain purposes the statute of frauds certainly is a rule of evidence, it is not merely such, but is in many instances a positive restriction upon judicial authority in affording remedies; and in this latter light it is regarded by those decisions which uphold its strict application. Where, therefore, a party seeks to enlarge his agreement, either as to subject-matter or other provisions, by the introduction of facts resting wholly in parol, the prohibition of the statute is held to apply; and as the statute requires the contract to be substantiated by some writing, the fact that the want of such writing is occasioned by fraud, accident or mistake is not a material circumstance unless superior equities intervene which will estop the defendant to set up the statute.[2] If there has been a part performance, or a change of condition or position made on the faith of the contract, these may be shown; but something of this character must intervene to operate as a ground of estoppel to deprive the other party of the right to set up the statute as a defense.

The preponderance of authority, however, seems to favor an opposite view, and to confirm the doctrine that a court of equity is competent to correct and reform any material mistake in a deed or other written instrument, whether the mis-

[1] See an instructive and scholarly monograph on this subject by H. Campbell Black in 24 Am. Law Reg. 81.

[2] Glass v. Hulburt, 102 Mass. 24. This is the leading American case upon this view of the subject. The doctrine is also announced in several older cases, notably Elder v. Elder, 10 Me. 80, where the court say: "It is one thing to limit the effect of an instrument and another to extend it beyond what its terms import. A deed by mistake conveys two farms instead of one. If the suffering party is relieved in such case by a court of chancery, full effect is not given to the terms of a written instrument. But the statute of frauds does not prescribe what effect shall be given to contracts in writing; it leaves that to be determined by the courts of law and equity. A deed conveys one farm when it may be proved by parol that it should have conveyed two. Here equity cannot relieve without violating the statute. To do so would be to enforce a contract in relation to the farm omitted without a memorandum in writing signed by the party to be charged or by his authorized agent." And see Jordan v. Fay, 40 Me. 130; Osborn v. Phelps, 19 Conn. 63; Climer v. Hovey, 15 Mich. 18; Webster v. Gray, 37 Mich. 37; Whiteaker v. Vanschoiack, 5 Oreg. 113.

take be the omission or insertion of a material stipulation; and whether it be made out by parol testimony or be confirmed by other more cogent proofs.[1] In some of the decisions the opinions in support of this doctrine are very broad and sweeping, but all, even the most conservative, unite in declaring that the same rule applies to contracts within the operation of the statute of frauds.[2]

The better and more firmly established doctrine would seem to be, therefore, that while the rule in courts of law is that the written instrument is better evidence of the intention of the parties than can be furnished by parol proof, and that in contemplation of law it contains the true agreement of the parties, yet courts of equity have the power, and will if justice requires it, look beyond the writing and grant relief from the effect of a deed or contract if entered into or founded in mistake or fraud.[3] Thus, if by contract between parties a purchase and sale is made of a certain tract of land, and the vendee is subsequently induced by the fraud of the vendor to part with his money and accept a contract in writing, and subsequently a deed, for another and different tract of land, there is no want of power in a court of equity upon a proper bill filed to declare the true agreement and grant relief either by reforming the deed or by compelling specific performance of the real contract.[4] The policy of the law, however, is to require evidence of title

[1] The leading case in support of this view is Gillespie v. Moon, 2 Johns. Ch. (N. Y.), 585, the decision being rendered by Chancellor Kent, in 1817. This was followed by Keisselbrack v. Livingstone, 4 Johns. Ch. (N. Y.), 144; and the same doctrine is announced in Tilton v. Tilton, 9 N. H. 392; Bellows v. Stone, 14 N. H. 175; Mosby v. Wall, 23 Miss. 81; Wall v. Arrington, 13 Ga. 91; Philpott v. Elliott, 4 Md. Ch. 273. And see Caley v. R. R. Co. 80 Pa. St. 370. The Pennsylvania cases, however, are in advance of the other state decisions respecting the admission of parol testimony, and cannot be said to represent the prevailing law upon this subject.

[2] See 1 Story Eq. Jur. § 161, announcing this doctrine. Mr. Pomeroy also says: "The statute of frauds is no real obstacle in the way of administering equitable remedies so as to promote justice and prevent wrong. Equity does not deny nor overrule the statute; but it declares that fraud or mistake creates obligations and confers remedial rights which are not within the statutory prohibition; in respect of these the statute is uplifted." 2 Pom. Eq. Jur. § 867.

[3] Gillespie v. Moon, 2 Johns. Ch. 585; Hunter v. Bilyeu, 30 Ill. 228.

[4] Schwass v. Hershey, 125 Ill. 653.

to real estate to be in writing, that nothing may be left to the frailty of the memory or as a temptation to the commission of perjury; hence, where it is sought to establish a contract by parol different from that evidenced by a written contract entered into between the parties, the proof should be clear and satisfactory.[1] The presumption is in favor of the written instrument, and that it is the true and full expression of the intention of the parties in respect of the subject-matter to which it relates. And the contract thus expressed will control unless it is clearly and satisfactorily established that the written instrument incorrectly states the agreement of the parties, while the contract sought to be substituted must be definitely and clearly shown.[2]

§ 28. Reformation will not lie after an action at law. It is a cardinal rule that where a party has a right to choose one of two inconsistent remedies, and with full knowledge of the facts makes deliberate choice of one mode of redress, he can not thereafter resort to the other, but must abide by the result of his election.[3] So it has been held that a party cannot maintain a bill in equity to reform a contract after he has resorted to an action at law upon the same; and where after a trial upon the merits he has been defeated, he is considered to have made his election by instituting legal proceedings, and is therefore bound thereby; and, notwithstanding that the contract may have been imperfect, yet the claim, having been once litigated and finally determined, cannot be renewed upon a reformation of the contract.[4]

[1] Miner v. Hess, 47 Ill. 170; Sapp v. Phelps, 92 Ill. 588.

[2] Schwass v. Hershey, 125 Ill. 653.

[3] Thompson v. Howard, 31 Mich. 309; Rodermund v. Clark, 46 N. Y. 354; Thomas v. Joslin, 36 Minn. 1. The rule is otherwise where the remedies are consistent, although there can in any event be but one satisfaction. Bowen v. Mandeville, 95 N. Y. 237; Connihan v. Thompson, 111 Mass. 271.

[4] Thomas v. Joslin, 36 Minn. 1; Washburn v. Ins. Co. 114 Mass. 175; Steinbach v. Ins. Co. 77 N. Y. 498.

CHAPTER XXX.

FORFEITURE.

§ 1. General principles.
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5. Vendor must have ability to perform.
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§ 1. General principles — Definition. A forfeit in the legal meaning of the term is a loss suffered by way of penalty for some misdeed or negligence. The principle has a wide application in the law of real estate, and is often permitted to be invoked on the breach of conditions annexed to grants and contracts relating to land. The word includes not merely the idea of losing, but also of having the property transferred to another without the consent of the owner and wrong-doer; and it is in this sense that it is used on the occasion of a declaration of forfeiture for the breach or non-performance of the conditions expressed in land contracts and agreements for conveyance.

But forfeitures are not and never have been regarded by the courts with any special favor; and where a party insists upon a forfeiture, he must make clear proof and show that he is entitled to it. It has ever been regarded as a harsh way of terminating contracts, and for this reason he who seeks to avail himself of the privilege must be held strictly within the limits of the authority which gives the right.[1] The right to declare a forfeiture is derived from the stipulations of the bond or agreement for conveyance, and is reserved ordinarily as an option on the part of the vendor, who upon failure of the vendee

[1] Palmer v. Ford, 70 Ill. 369.

to comply with its terms may elect to declare the contract at an end.[1] Under such a contract the right to declare a forfeiture for non-performance without the tender of a deed must be sustained by a court of law.[2] If there be any hardship or ground for relief the vendee must apply to a court of equity; yet if parties under no disabilities choose to contract for a forfeiture, in the absence of any fraud or improper practices on the part of the vendor a court of equity can afford the vendee no relief against the same.[3] Parties have the right to make their contracts as stringent as they please, and to make time of the very essence; and if one party, without the consent of the other, allows the specified time to pass, no matter for what cause, without performing the condition, the stipulated consequence must follow.[4]

Forfeiture is essentially a creation of law, as equity will never, by affirmative action, enforce a penalty or forfeiture or any stipulation of that nature, but will always leave the party entitled to prosecute his claim in a court of law according to legal rules.[5] There are a few apparent exceptions to this rule, but inasmuch as they depend upon other rules and principles they cannot be said to be real exceptions.

§ 2. **Construction.** It is no reason for refusing to accord a literal construction to a contract that it is harsh and severe; and where there has been no fraud or misunderstanding, an agreement must receive that interpretation which appears upon its face. If the terms are clear and unequivocal, and in express language stipulate for forfeiture, a court can have no option, but must declare the clear intent; nor is a harsh and severe stipulation to be disregarded as inconsistent with the dominant provision of a contract, if they can be construed together and reconciled.[6] Yet, as forfeitures are odious, the right to declare the same must clearly and unquestionably ap-

[1] As where it is provided that time shall be of the essence of the contract, and that in case the purchaser fails to comply with its terms the vendor may elect to declare the contract at an end and the payments made upon it forfeited.

[2] O'Neal v. Baptist Church, 48 Ill. 349.

[3] Brink v. Steadman, 70 Ill. 241.

[4] Chrisman v. Miller, 21 Ill. 227.

[5] Miller v. Havens, 51 Mich. 485; Warner v. Bennett, 31 Conn. 468; Marshall v. Vicksburg, 82 U. S. 149; Dunklee v. Adams, 20 Vt. 422; Smith v. Jewett, 40 N. H. 530.

[6] Goodridge v. Forsman, 79 Me. 132.

pear; for when the terms are indefinite, uncertain, and capable of two constructions, and by giving them one construction one of the parties would be subjected to a forfeiture, and by giving them the other no such forfeiture would be incurred, and no injustice would be done to the other party, the contract should be so construed as not to create the forfeiture.[1]

§ 3. **Right of forfeiture a privilege of the vendor.** A reserved right of forfeiture is the exclusive privilege of the vendor, to be exercised or not at his option. If the vendee fails to fulfill the conditions of his agreement the vendor may treat it as void or as in force.[2] If money has been paid upon the contract he may retain it as a forfeit, or if nothing has been received he may elect to regard it in force and sue for the purchase money, or he may declare it forfeited and proceed for the recovery of the liquidated or other damage.[3] The vendee, on the other hand, has no voice or privilege in terminating or continuing the agreement; and even where an apparent option is given, as where the contract provides that the purchase money shall be paid by instalments, and that if the purchaser at any time fail to meet his payments he will surrender the possession of the land to the vendor, this does not entitle the purchaser to elect whether he will pay the purchase money or surrender the possession of the land.[4]

[1] As, for example, in the case of a contract, each of two separate paragraphs of which related to the sale of different property, and it became a question whether a provision for a forfeiture applied to both parts of the contract or only to one. Jacobs v. Spaulding, 71 Wis. 177.

[2] Wilcoxon v. Stitt, 65 Cal. 596.

[3] A contract of sale provided for the payment of the purchase money in instalments, and that in case the vendee "shall fail to make the payments aforesaid, or any of them, punctually, and upon the strict terms and time above limited, . . . the time of payment being of the essence of the contract," then the vendor "shall have the right to declare this contract null and void, . . . and the premises hereby contracted shall revert to and revest in the said first party without any declaration of forfeiture or act, or without any other act by said first party to be performed;" and for the performance of the contract the vendee bound himself in the "penal sum of $200 as liquidated damages." The vendee failed to pay the first instalment. *Held*, that the vendor might sue on the contract to recover such instalment, as the contract became void only at his election, and that he was not bound to sue for the liquidated damages as his sole remedy for breach of the contract by the vendee. Higbie v. Farr, 28 Minn. 439.

[4] Rourke v. McLaughlin, 38 Cal.

§ 4. **Continued — When contract contains mutual covenants.** But while forfeiture, as a general rule, is a privilege of the vendor, to be exercised or not at his option, and the vendee is debarred from treating the contract as rescinded merely by a surrender of possession and a waiver of any further rights in the money previously paid by way of earnest or upon instalments, yet the wording of the agreement relating to forfeiture may under some circumstances be construed to create mutual covenants that will extend this privilege to the vendee as well. Cases of this kind are not difficult to imagine, and the books furnish us with precedents on which to base the rule. Thus, where by the terms of the agreement it is stipulated that upon failure to make payments as agreed, or if such failure continue for a specific time thereafter, all payments theretofore made should be forfeited, and the agreement thereafter be null and void, if default occur the contract, by its terms, comes to an end at the time limited.[1] A contract so worded has been held to create mutual covenants — the vendee in case of default agreeing to forfeit all money previously paid, and the vendor agreeing that thereafter the contract shall cease; or, in other words, in consideration of the vendee's agreement to forfeit the money which he shall have paid, the vendor agrees to accept that in full satisfaction of the agreement, and to release and discharge the vendee from all subsequent liability thereon.[2]

196. In the case of Mason v. Cadwell, 5 Gilm. (Ill.) 196, it was *held* that a clause inserted in a contract for the purchase of real estate, which provided that should the purchaser fail to pay the money within ten days after it became due, he should forfeit all claim to the land and the money paid thereon, and the contract should be void in law and equity, and the title to remain in the vendor as if no sale had been made, was not forfeited by a failure to make the payments; but that it must have been inserted as a penalty which the vendor might enforce to insure a prompt performance of the contract by the purchaser, and that the latter could take no advantage of his own failure to make payment: and that the contract was mutually binding on the parties until a forfeiture should be declared by the vendor. And see Moore v. Smith, 24 Ill. 512.

[1] See Streeper v. Williams, 48 Pa. St. 450.

[2] As where an agreement under seal for the sale of land contained the following clause: "It is expressly understood and agreed that in case the party of the second part shall fail to pay either of the payments above stated at the time specified, and shall continue to omit said payment for five days thereafter, then the moneys which have before said time been

§ 5. Vendor must have ability to perform. As a general rule the vendor cannot declare a forfeiture unless he is in a condition to compel a specific performance;[1] and where the payment of the purchase money and the making of a conveyance are concurrent acts, the vendor, or his heirs after his death, have no power to declare a forfeiture of the contract unless they at the time are ready and have the ability to convey according to its terms.[2] Hence, the rights of a vendee under a contract for conveyance upon payment of the purchase money cannot be forfeited by the vendor, although default has been made in the payment of the price, while he has no title to convey and is not in position to perform his part of the agreement;[3] and this, too, notwithstanding time may be of the essence of the contract.[4]

Where the land is incumbered so that the vender cannot comply with his agreement to convey the same by a perfect title, and for this reason could not insist on specific performance, but yet declares a forfeiture and recovers in ejectment, the vendee may, notwithstanding the incumbrance, tender the balance of the purchase money, waive his right to insist upon a perfect title, and compel a specific performance of the agreement. And it would be equitable, in such a case, to decree that the purchaser pay the balance of the price agreed, less the amount of the incumbrance, which the purchaser should be decreed to pay, and to require the vendor to execute a deed with the covenants stipulated for in the contract.[5]

§ 6. Fraud of vendor. A vendor will not be permitted to declare a forfeiture as for default where such default is directly

paid shall be forfeited, and this agreement is null and void thereafter." The first instalment of the purchase money was paid at the time of execution of the agreement, but no further payments were made. In an action of debt by the administrators of the vendor against the vendee, and on demurrer thereto, *held*, that the clause quoted contained mutual covenants and that the vendee was not liable. Neill v. Peale, 4 Atl. Rep. (Pa.) 830.

[1] Wallace v. McLaughlin, 57 Ill. 53; Snyder v. Spaulding, 57 Ill. 480; Converse v. Blumrich, 14 Mich. 109.

[2] Peck v. Brighton Co. 69 Ill. 200; Baker v. Bishop Hill Colony, 45 Ill. 264.

[3] Converse v. Blumrich, 14 Mich. 109.

[4] Baker v. Bishop Hill Colony, 45 Ill. 264.

[5] Wallace v. McLaughlin, 57 Ill. 53.

attributable to his own bad faith or to any fraudulent artifice practiced by him in inducing the sale. Thus, where a vendor falsely asserts and represents that his title is unimpaired and free from incumbrance, and so induces the purchaser to forego an examination of the title, and the purchaser, relying on such representations, enters and makes payments and improvements on the land before he learns of the incumbrances, and then refuses to make further payments on the purchase until the incumbrances are removed, he cannot be held in default in making payment.[1]

§ 7. **How made.** A forfeiture of a contract for the sale of land may be declared by a reasonable notice of the intention so to do, if a strict performance be not made;[2] and it would seem that even where the right to any notice has been expressly waived such notice should nevertheless be given before such declaration can properly be made.[3] In many instances overt acts manifesting intention have been held equivalent to notice; as where on the vendee's non-compliance the vendor, where he holds no securities of a negotiable character, sells the property to another, this has been taken as a clear manifestation of an intention to end the contract, and is held to be an unequivocal declaration of forfeiture.[4] If the contract provides for a written notice such notice should be given;[5] and if any particular manner is specified the specification should be followed. When this is done the declaration would seem to have been properly made, even though no personal service is had upon the vendee; as where a contract for conveyance on the payment of certain sums annually provided that on default in any payment the vendor might have an immediate right of re-entry on depositing written notice in the office of the county recorder, it was held that no other notice than this was necessary, and that the right of re-entry was not lost by mere delay in filing notice for some time after default.[6]

As the stipulation for forfeiture is for the benefit of the vendor, so the stipulation for notice is for the benefit of the

[1] Wallace v. McLaughlin, 57 Ill. 53.
[2] Steele v. Biggs, 22 Ill. 643.
[3] Palmer v. Ford, 70 Ill. 369.
[4] Warren v. Richmond, 53 Ill. 52.
[5] Case v. Wolcott, 33 Ind. 5.
[6] Kerns v. McKean, 65 Cal. 411.

vendee, and a strict compliance with it is necessary before declaring a forfeiture.[1]

§ 8. **When vendor must first offer to perform.** Ordinarily a vendor is not bound to make any offer of performance or to tender a deed before declaring a forfeiture. The contract gives him the option of an election which he may exercise in his discretion on the failure of the vendee to comply with the terms of the agreement when time is of the essence. But it would seem, even where time is made of the essence of the contract, that if all of the payments are due and the vendor has failed to exercise his right to declare a forfeiture for default in making payments, he must first offer to perform before declaring a forfeiture. The silence or inaction of the vendor must be regarded as a waiver of his rights, and the payment of the purchase money and tender of conveyance would become concurrent acts, and a deed should be executed and tendered to the vendee together with a demand for payment. If the vendee then refused to pay for the land and accept the deed, a clear right to terminate the contract by forfeiture would exist.[2]

And the same rule would apply with even stronger force in a case where the vendor never exercised the right to declare a forfeiture in his life-time, though the payments had all matured, and after his death his heirs declared the contract forfeited for non-payment. They must show that they were prepared to make the conveyance; and they could not legally declare a forfeiture without showing that they offered to convey the land or that they were ready and able to convey, as required by the contract.[3]

[1] As where a stipulation for forfeiture further provided that the vendor should first, within a given time, notify the purchaser of such features as he thought had not been complied with and demand a compliance, *held*, in an action by the purchaser, who had partly performed the contract on his part, against the vendor for wrongfully declaring a forfeiture and thereby putting it out of the power of the purchaser to further comply with the terms of the contract, that in such case the purchaser was not required to perform or offer to perform his part of the contract, but might have his action for being prevented from so performing. Case v. Wolcott, 33 Ind. 5.

[2] Mix v. Beach, 46 Ill. 311; Peck v. Brighton Company, 69 Ill. 200.

[3] Peck v. Brighton Company, 69 Ill. 200.

§ 9. Forfeiture and resale — Rights of second purchaser. Where a vendor has properly declared a forfeiture of the contract for non-performance on the part of the vendee, and made a resale of the premises to a third person, he cannot afterwards waive the forfeiture so declared and restore the original contract so as to give it any force as against the second purchaser.[1] As against himself he may always waive it, but not as against his subsequent vendees. By the forfeiture and resale the rights of the first purchaser are extinguished, and the equities of the second purchaser become paramount. But in every instance a forfeiture must have been declared to bar the rights of the first purchaser; there must be some act done to terminate the contract and to enforce the penalty, and until this is done the contract continues mutually binding.

A subsequent purchaser who buys with notice holds subject to the rights of the first; and though the prior purchaser is in default and the vendor would be entitled to declare a forfeiture, yet this avails the second purchaser nothing, the vendor having the sole right to exercise the option. Improvements made by the second purchaser under such circumstances will be regarded as made in his own wrong, and will not be permitted to affect the rights of the prior purchaser or those claiming under him.[2]

§ 10. Lapse of time does not work forfeiture. Lapse of time alone will not put an end to a contract for the sale of land conditioned to be void at the election of the vendor upon the failure of the vendee to fulfill the covenants, conditions and agreements thereof; for time is not of the essence of the undertaking to pay money by such a contract, and default in payment must be followed by some act of the vendor indicating his election to consider the contract at an end.[3] Notwithstanding the vendee may be in default, yet if the vendor does not see fit to exercise his option of forfeiture, the contract will remain in full force;[4] and even if time is of the essence of the

[1] County of Livingstone v. Dart, 56 Ill. 437; Whitaker v. Robinson, 65 Ill. 411.

[2] Dart v. Hercules, 57 Ill. 446.

[3] Bomier v. Caldwell, 8 Mich. 463; D'Arras v. Keyser, 26 Pa. St. 249; Jones v. Loggins, 37 Miss. 546; Chrisman v. Miller, 21 Ill. 227; Brink v. Morton, 2 Iowa, 411.

[4] Converse v. Blumrich, 14 Mich. 109.

contract, the vendor may waive the forfeiture by continuing and acting upon the contract.[1] This principle, however, is mainly for the benefit of the vendor; for a provision in a contract that, if the vendee fails to make either or any of the payments therein provided for, the vendor, at his option, may declare a forfeiture, operates to make time of the essence of the contract, and to impose upon the purchaser the necessity of offering to perform on his part at the time or times designated.[2]

§ 11. **Waiver.** If the vendor chooses to waive a forfeiture in favor of a purchaser he is at liberty to do so, and circumstances will frequently be sufficient evidence of the manifestation of such intention. Thus, where by the terms of a contract the vendee was to pay a certain portion of the money within a specified time, which was before the day fixed for the delivery of the deed, if he does not pay the money within the specified time, but pays it afterward, and it is accepted by the vendor as a payment on the contract, such acceptance by the vendor would be a waiver by him of the provisions of the contract in regard to time, and the contract would be as binding upon the parties as though the money had been paid within the time therein stipulated.[3] And if the vendor afterwards accounts with the purchaser as to the balance due, and stands by and allows the purchaser to pay all taxes and make expensive improvements upon the land, a tender to him of the sum due by either the purchaser or his assignee at any time before forfeiture is declared will be good, and the contract may be specifically enforced, notwithstanding time is made of the es-

[1] Baker v. Bishop Hill Colony, 45 Ill. 264.

[2] Kimball v. Tooke, 70 Ill. 553.

[3] Wolf v. Willits, 35 Ill. 88; Stow v. Russell, 36 Ill. 18; Grigg v. Landis, 21 N. J. Eq. 494; Hutchings v. Munger, 41 N. Y. 158. When a contract reserves to the vendor the right to rescind if full payment of the purchase money is not made by a certain day, and to treat the partial payments as rent money, he waives his right by continuing to receive partial payments after that day. Stewart v. Cross, 66 Ala. 22. And so where a bond to convey a lot stipulated that the purchaser should, within a time specified, erect a house of a certain size upon the lot, but no building was erected until long after the time fixed, when one greatly exceeding in value and dimensions the one provided for in the bond was completed, *held*, that the obligors not having manifested any intention to treat the bond as forfeited for nonperformance of the stipulation, the condition would be considered in equity as substantially performed. Van Orman v. Merrill, 27 Iowa, 476.

sence of the contract, and there has been considerable delay in offering to pay.[1]

Again, a vendor may waive his right to declare a forfeiture by his acts; as where a series of notes was given for the purchase price of land, and the contract reserved to the vendor the right to declare a forfeiture thereof in case of default in the payment of any one of the notes within a specified time after its maturity, a transfer by the vendor of the last note in the series to a *bona fide* holder after default in respect to one of the prior notes, and knowledge thereof, would operate as a waiver of such right. By such transfer the vendor would be debarred the right of rescinding on account of default in the payment of the notes remaining in his hands, having thus put it out of his power to terminate the contract as to the whole extent to which it remained executory on the part of the vendee; and an attempt by him to declare a forfeiture under the power given in the contract would be wrongful and put him in default, so that the vendee would then be at liberty to treat the contract as rescinded, stop short in its performance, and when he had paid the note which had been assigned he might sue the vendor in an action at law, and recover back all that he had paid, although by the terms of the contract, if the forfeiture had been rightfully declared, all that had been paid by the vendee would have been forfeited to the vendor.[2]

A vendor may be precluded from declaring a forfeiture by his own statements made to and acted upon by the vendee. Thus, where the vendor stated to his purchaser that he would not insist on the forfeiture stipulated in the contract on default of prompt payments, this was held to be a waiver of his right to forfeit, the purchaser having meanwhile made valuable improvements.[3] And in any event, where the vendor has

[1] Allen v. Woodruff, 96 Ill. 11.

[2] Iglehart v. Gibson, 56 Ill. 81. While the transfer by the vendor of the last of the series of notes given for the purchase money would debar him of the right of rescinding the contract by reason of default in payment of any of the other notes, because he would thereby be disabled from surrendering up all the unpaid notes, such transfer would not operate as a waiver of any default on the part of the vendee in regard to any of the notes maturing after such transfer, so far as such default might affect the right of the vendee to a specific performance. Ibid.

[3] Blair v. Blair, 48 Iowa, 393. And see Dement v. Bonham, 26 Ill. 158.

agreed, whether upon a consideration or not, to extend the time fixed by the contract for payment, he will not, without first demanding payment, be permitted to declare a forfeiture for a failure to pay at maturity.[1] Where the vendor's assurance occasions the delay he ought not, in good faith, to be allowed to take advantage of it.[2]

But while the acceptance of an overdue instalment will be considered as a waiver of the penalty of forfeiture so far as respects that particular instalment, yet the mere receipt of one or more payments after the time fixed upon will not of itself operate as a waiver of the right to declare a forfeiture for the non-payment of instalments subsequently falling due.[3] So also mere lapse of time will not indicate a waiver on the part of the vendor; nor will his right to declare a forfeiture be lost by simple delay in giving notice for some time after default.[4]

Where the vendee makes default and the vendor takes no steps towards a rescission of the contract until after the time fixed for its completion, the vendor, it has been held, is considered as having acquiesced in the breach of the condition and waived the forfeiture, if any had occurred thereby.[5]

Acts of the vendor or those in privity with him indicating an intent to keep the contract alive will overcome the effect of express language in the contract; and so, although time may have been of the very essence of the agreement, so that the purchaser on failing to make payment on the day would forfeit his right to do so afterwards, yet if the vendor, or, in case he may have resold, his assignee, after the right to declare the forfeiture has accrued, proceed in equity for a specific performance, and obtains a decree allowing time for payment, this will rehabilitate the purchaser to all his rights, the time given in the decree completely reinstating him.[6]

§ 12. **Effect of indulgence.** In the absence of other circumstances, nothing can be predicated upon a mere neglect of the vendor to declare a forfeiture at the time such right accrues; and the fact that the vendor has before indulged the vendee by accepting payments after they were due furnishes

[1] Thayer v. Meeker, 86 Ill. 470.
[2] Dement v. Bonham, 26 Ill. 158.
[3] Lent v. R. R. Co. 11 Neb. 201; Cunningham v. R. R. Co. 77 Ill. 178.
[4] Kerns v. McKean, 65 Cal. 411.
[5] Steele v. Branch, 40 Cal. 13.
[6] Dennis v. McCagg, 32 Ill. 429.

no excuse for his not meeting the other payments promptly; nor will it operate to prevent the vendor from declaring a forfeiture.[1] It would seem, however, that where a forfeiture has been practically waived by partial payments by the vendee after the time prescribed, the vendor cannot then suddenly stop short and insist upon a forfeiture for the non-payment of the arrears remaining unpaid, without any previous notice of his intention so to do if the arrears are not paid.[2] Indeed, the fact of indulgence is a strong circumstance tending to show that neither party intended that a failure to perform the contract according to its terms, at the time specified, should forfeit the right of the party failing to have a specific performance; and where the vendor suffers the purchaser to remain in possession of the property, and receives payments from him down to within a short period of declaring a forfeiture, such payments aggregating a large portion of the purchase price, he will, it seems, not be permitted to insist upon a forfeiture without first giving notice to the vendee and allowing him a reasonable time to perform on his part.[3]

§ 13. Acquiescence by the vendee. While a mere failure to pay on the day fixed will not work a forfeiture when time is not made the essence of the contract, and rigid forfeitures will never be encouraged where the delay in payment does not arise out of a desire to repudiate the contract or procrastinate payment, yet if a vendee intends to hold the contract as subsisting he must take reasonable steps to evidence his intention; and where he neglects to tender payments when due, or otherwise to perform or offer to perform agreeably to the stipulations of the contract, if the contract has been declared forfeited by the vendor, unless he can show that his failure was the result of fraud, accident or mistake, he will be presumed to have acquiesced in such repudiation of the contract by the vendor. The rule is practically the same, notwithstanding the declaration of forfeiture by the vendor is conceded to be wrongful;[4]

[1] Phelps v. R. R. Co. 63 Ill. 468.

[2] Harris v. Troup, 8 Paige (N. Y.), 423; Grigg v. Landis, 21 N. J. Eq. 508; and see Schiffer v. Deitz, 83 N. Y. 300.

[3] More v. Smedburgh, 8 Paige (N. Y.), 607; Schiffer v. Deitz, 83 N. Y. 300.

[4] Iglehart v. Gibson, 56 Ill. 81; Kimball v. Tooke, 70 Ill. 553. In this case it was held that, where it was claimed by a vendor that he had de-

and although a declaration of forfeiture is not justifiable, yet if the purchaser lies by for an unreasonable length of time without asserting his equities until others have acquired the legal title in good faith upon the honest belief that the forfeiture was rightful, and that he acquiesced in the same, his equities will not be superior to those thus acquiring the legal title, and they will be protected against his claims.[1]

§ 14. Relief in equity. As has been stated, the doctrine is that if, upon the face of a contract, it clearly appears to have been the distinct understanding and agreement of the parties that if a stipulated act was not performed within a specified time certain consequences were to follow; and if default has been made in the performance within the time, a court of equity will give no relief unless a strict performance was either waived by the party entitled to its benefits or is excused on some special ground of equitable cognizance. But even though the contract contains a provision for forfeiture in case of failure to perform strictly in point of time, nevertheless a court of equity will examine the whole contract, in the light of the surrounding circumstances, to ascertain whether it was the real intention of the parties that the party in default should lose the right secured to him by the contract.[2]

clared a forfeiture of the contract for a failure of the vendee to make the first payment, and the vendee, at a subsequent time, tendered the amount of such first payment to the vendor, and the vendor refused to receive same, and stated to the vendee that the contract was at an end — that no contract existed — it was still obligatory upon the vendee to make a tender of the other instalments as they became due; and a failure to do so will be an acquiescence in the declaration of forfeiture, whether it was rightfully made or not in the first instance.

[1] O'Neal v. Boone, 82 Ill. 589.

[2] As where a contract for the sale of land contained a covenant that the vendees should, as part of the consideration, discharge and satisfy, at its maturity, a mortgage thereafter to become due, and also contained a stipulation to the effect that, should the vendees fail to comply with their part of the agreement, the contract to be null and void and the land revert to the vendors, *held*, that time was not of the essence of the contract; and the provision that the land should revert to the vendors must be deemed inserted, by way of penalty, to induce a prompt performance of the contract, and did not work a forfeiture for failure to perform strictly in point of time, where the vendees acted in good faith and the vendors were not damaged by the delay. Steele v. Branch, 40 Cal. 3. So, also, where after forfeiture and pending proceedings by the vendor to regain possession, the purchaser,

Equity will often intervene to relieve against penalties and forfeitures, where the matter lies in compensation, whether the condition on which they depend be precedent or subsequent; but usually, where a vendee has made default and subsequently tenders the whole of the purchase money or a full compliance with the obligations of the contract, he must, to obtain such relief, present some equitable considerations in excuse for his negligence.[1] He must show that circumstances which exclude the idea of wilful neglect or gross carelessness have prevented a strict compliance, or that it has been occasioned by the fault of the other party, or that a strict compliance has been waived.[2] This seems to be imperative; for notwithstanding that equity will interfere in many cases to prevent the divesting of an estate, it will not usually relieve against the non-performance of a condition precedent to the vesting of an estate by giving an estate that never vested, and that, by reason of the non-performance of a condition precedent, will not vest at law; and when it is not a question of penalty or forfeiture, but only of a privilege conferred upon payment of money at a stated period, the privilege is lost if the money is not paid, and the court will not restore it to the party.[3]

§ 15. Annexations by purchaser. A purchaser who makes improvements, or places buildings upon land of which he is in the occupancy under a contract of purchase, does so at his peril; and such improvements will ordinarily inure to the benefit of the owner of the fee as constituting a part of the freehold, if the purchase is not completed.[4] Nor does the method of annexation seem to have a very perceptible influence upon the operation of the rule. Any erection, however slight, will serve to support the character of a fixture, under the principle that the vendee, while occupying the premises under his contract, has no right to erect a building thereon with intent to remove it, and that such intent would be a fraud upon the vendor's

without much delay, tendered payment of the purchase money and the costs of proceedings already taken, *held*, that the vendor should accept the same; but the tender should not be confined to such costs only as were taxable in the proceedings, but should be sufficient to make the vendor whole for his expenditures. Stickney v. Parmenter, 35 Mich. 237.

[1] Estes v. Browning, 11 Tex. 247.

[2] Jones v. Robbins, 29 Me. 351.

[3] Bank v. Smith, 3 Gill & J. (Md.) 265.

[4] Tyler v. Fickett, 75 Me. 211.

rights.[1] Nor will the vendee be permitted to sell or dispose of any of the buildings or erections he may have placed on the land pending the completion of the purchase; and as the vendee is restricted from removing such building, so also would be a purchaser from him, and the vendor may maintain replevin against any person who may attempt to remove it.[2]

§ 16. **Forfeiture of option.** An option of purchase rests on different grounds and is governed by different rules from those which obtain in case of bilateral contracts. Where the time for acceptance is not limited, it must, if given for a consideration, remain open for a reasonable time, to be determined by all the circumstances of the case;[3] but if the option reserved is to purchase at any time before a certain day, for a certain sum to be paid on demand for deed, time is of the essence of the contract, and equity cannot relieve after the time, nor require the repayment of money paid to secure the option.[4]

[1] Ogden v. Stock, 34 Ill. 522.

[2] In Ogden v. Stock, 34 Ill. 522, a purchaser of a city lot, holding it under a contract of purchase, with clauses of forfeiture, erected a house thereon placed upon blocks lying on the ground, and, having failed to make his payments on the contract, sold the house to a person who removed it from the lot. The vendor of the lot then replevied the house. *Held*, that the vendee could not erect the house with intent to remove it, and that the purchaser of the building stood in no better position; and when he severed the house from the freehold the right of possession attached to the owner of the freehold, who could maintain replevin so long as the house could be identified and was not permanently annexed to other realty. And see Salter v. Sample, 71 Ill. 430.

[3] Larmon v. Jordan, 56 Ill. 204.

[4] Steele v. Bond, 32 Minn. 14.

CHAPTER XXXI.

RESCISSION.

§ 1. General principles.
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§ 1. General principles. Rescission is the annulling or abrogation of a contract, and may take place either by mutual consent or at the instance of one of the parties in consequence of some default or dereliction of the other. It is a remedy that may always be made available whenever the transaction has been vitiated by illegality or fraud, or has been carried on in ignorance or mistake of facts material to its operation; yet, like specific performance, it is not to be invoked as a matter of absolute right, its exercise resting in the sound discretion of the court.

It has often been contended that there is no difference, in reason and principle, between an application for specific enforcement and an application to rescind — the one being, as it were, the reverse of the other, and the same grounds being

invoked in either case; but as a matter of fact, as well as of law, the two remedies are separated by a broad and strong line of distinction. In the first instance the application at best merely presents the question whether it is better, for the furtherance of justice and in view of all the circumstances, to give to the party applying a specific execution, or leave him to his legal remedy. On the other hand, an application for rescission is a request for the annihilation of a solemn contract, ofttimes rendered still more imposing from the fact that the parties have carried it into execution, thereby materially changing their situations and giving birth to new obligations. Hence, we frequently find courts refusing the specific performance of a contract, which, at the same time, they just as promptly refuse to rescind.[1]

Executory contracts may be rescinded for a variety of causes, and relief will seldom be refused upon a meritorious showing. Fraud, misrepresentation, defective title, deficiency of quantity or laches of the other party may all furnish grounds for rescinding; but, to rescind an executed contract in equity, fraud or misrepresentation of some kind must appear. Mere failure of consideration, arising from the sale of a defective title, or other circumstances unmingled with fraud or bad faith of any kind, is not sufficient, and the parties will be left to their legal remedies. To this general rule there are a few exceptional cases that may be classed under the head of mistake; but the mistake must be plain and palpable, and must affect the very subject-matter of the contract.[2]

§ 2. **Mutual agreement.** A rescission may always be effected by the voluntary act of the parties, either by novation or a simple agreement to rescind, where they continue to occupy their original relations;[3] and even though such rescission may affect the interest of third persons, the privilege cannot be denied provided no substantial rights are impaired.

It has been held in some of the earlier cases that an agreement to rescind is as much an agreement concerning land as

[1] Thompson v. Jackson, 3 Rand. (Va.) 504; Kimball v. Tooke, 70 Ill. 553.

[2] Thompson v. Jackson, 3 Rand. (Va.) 504.

[3] Johnson v. Reed, 9 Mass. 78; Lauer v. Lee, 42 Pa. St. 165; Blood v. Enos, 12 Vt. 625.

the original contract, and hence should be in writing; but all the later cases, both in England and the United States, are unanimous in affirming that a contract in writing, and by law required to be in writing, may in equity be rescinded by parol;[1] and this even though the contract may have been under seal.[2] Such rescission may be effected not only by an express agreement, but by any course of conduct clearly indicating a mutual assent to the termination or abandonment of the contract.[3] It may consist either of words or acts, and all the circumstances attending the transaction may be shown to prove intention; but if evidenced by acts alone they must be such as leave no doubt as to such intention.[4]

§ 3. **Novation.** One of the most common forms of rescission by mutual agreement consists of what is termed novation; that is, the entering into a new contract which takes the place of the original one, and in which it is merged and extinguished. If the new contract in express terms rescinds the old one, no question can arise; yet the same result follows as a necessary implication, and takes place by operation of law without any express agreement to that effect whenever the new contract is manifestly in place of or inconsistent with a former one, or which renders a former contract impossible of performance.[5]

As all contracts for the sale of land must be evidenced by a writing to permit their enforcement, it necessarily follows that the new contract by which a novation has been accomplished must be in writing also, or that there shall have been a partial performance under it sufficient to except it from the operation of the statute and permit parol proof.

§ 4. **Non-compliance.** A neglect or refusal of either party to perform on his part will, as a rule, place it in the power of the other party, where he is not also derelict, to avoid the contract or not at his pleasure. Hence, a failure to meet payments at the time or times reserved may be treated by the vendor as an abandonment, and he may rescind the contract and sell the land to another.[6] And in such case the vendee

[1] Lauer v. Lee, 42 Pa. St. 165.

[2] Babcock v. Huntington, 9 Ala. 869; Low v. Treadwell, 12 Me. 441.

[3] Wheeden v. Fisk, 50 N. H. 125; Murray v. Harway, 56 N. Y. 337; Dial v. Crane, 10 Tex. 444.

[4] Lauer v. Lee, 42 Pa. St. 165.

[5] Pane v. Meservy, 58 Me. 419; Pierce v. Dorr, 8 Pick. (Mass.) 239.

[6] Ketchum v. Evertson, 13 Johns. (N. Y.) 359; Carney v. Newberry, 24 Ill. 203.

will not be entitled to recover back the money he may have advanced in part performance.[1] But while the failure of one of the contracting parties to fulfill the agreement will be sufficient to authorize the other party to rescind, yet mere failure will not of itself work a rescission nor absolve the parties from the obligation of the contract;[2] and where time is not of the essence of the contract, there should be a tender and demand before the right to rescind is exercised.[3]

§ 5. **Estoppel by acquiescence.** Where a party intends to abandon or rescind a contract on the ground of a violation of it by the other, he must do so promptly and decidedly on the first information of such breach. If, with full knowledge or with sufficient notice or means of knowledge of his rights and of all the material facts, he lies by for a considerable time, or abstains from impeaching the transaction, so that the other party is induced to suppose that it is recognized, this will be an acquiescence, and the transaction, although originally impeachable, ceases to become so in equity.[4]

§ 6. **Mistake.** Mistake has been lucidly and learnedly defined by Mr. Pomeroy[5] as "an erroneous mental condition, conception or conviction, induced by ignorance, misapprehension or misunderstanding of the truth, but without negligence, and resulting in some act or omission done or suffered erroneously by one or both of the parties to a transaction, but without its erroneous character being known or intended at the time." Fraud or negligence is frequently present, and intermingles with it; but, abstractly considered, it is distinguished from fraud in the absence of knowledge or intention, and from negligence in that it is not the result of thoughtlessness or inattention.

Mistake is a common ground for equitable interference in

[1] Green v. Green, 9 Cow. (N. Y.) 46.

[2] Carney v. Newberry, 24 Ill. 203.

[3] Gregg v. English, 38 Tex. 139.

[4] Odlin v. Gove, 41 N. H. 465; Peabody v. Flint, 6 Allen (Mass.), 52; Cobb v. Hatfield, 46 N. Y. 533.

[5] Pomeroy's Eq. § 839. Mr. Jeremy defines mistake, as understood in equity, to be "that result of ignorance of law or of fact which has misled a person to commit that which, if he had not been in error, he would not have done." 3 Jeremy, Eq. Jur. 2358. Mr. Story says: "So if a party has *bona fide* entirely forgotten the facts he will be entitled to relief, because, under such circumstances, he acts under like mistake of the facts as if he had never known them." Story, Eq. Jur. § 110.

the reformation of deeds and contracts, and relief will ordinarily be granted by way of rescission in cases of mutual mistake,[1] or, under certain circumstances, for a mistake on one side only, provided, however, that such mistake must be of the substance of the thing contracted for; that is, that the purchaser cannot get what he substantially bargained for, or the vendor would be compelled to part with what he had no idea of selling.[2]

It must be remembered, however, that the law does not demand that both parties shall be in possession of the same knowledge or information respecting the property, provided that each has had opportunity for investigation and an equal advantage in ascertaining the facts. It imposes as a duty that each shall be vigilant and prompt to avail himself of the means of knowledge within his reach;[3] and where parties stand upon a footing of equality, and no fraud is committed by either, each must abide by the contract, and each is entitled to the benefit of his own sagacity.[4] In such cases equity will not stretch out its arm to protect those who suffer for the want of vigilance.[5] An examination of the decided cases shows that in nearly every instance where equity has interfered to rescind a contract or avoid a deed on the ground of ignorance or mistake, the mistake has been induced by fraud, or an abuse of confidence springing out of the peculiar relations between the parties. Where such conditions exist a rescission will ordinarily be decreed; yet even under these circumstances, to warrant this relief the mistake must have been of some material fact, and the fact must be of such a character that it animated and controlled the conduct of the mistaken party.[6] It must go to the essence of the object in view, and not be merely incidental; and the burden of proving this is thrown upon him who asserts it.

A person who is *sui juris* cannot, in the absence of fraud,

[1] Failing v. Osborne, 3 Oreg. 498.

[2] Crislip v. Cain, 19 W. Va. 440; Young v. Craig, 2 Bibb (Ky.), 270.

[3] Garrett v. Burleson, 25 Tex. 44; Lamb v. Harris, 8 Ga. 546; Trigg v. Read, 5 Humph. (Tenn.) 529.

[4] James v. Bank, 17 Ala. 69; Dambmann v. Schulting, 75 N. Y. 55.

[5] Dambmann v. Schulting, 75 N. Y. 55.

[6] Paulison v. Van Iderstine, 28 N. J. Eq. 306; Henderson v. Dickey, 35 Mo. 120; Dambmann v. Schulting, 75 N. Y. 55; Segur v. Tingley, 11 Conn. 134.

deny his written obligation by showing that when he signed it he had not read it,[1] or if, having read it, he did know its legal effect;[2] for while no one is bound to sign an instrument he does not understand, yet, if he signs it without asking to have it read or explained to him, he is bound by it and cannot escape the obligations imposed by it.[3] An illiterate person who signs an instrument which he is led, by misreading or misstatement of its contents, to believe to be an instrument of a different nature, will not be bound thereby, and may properly plead his mistake;[4] but where one permits himself to be defrauded and misled by not having the contract which he signs read to him, if he is unable to read, he debars himself from asking for relief.[5] One who can read and understand an instrument which he signs is bound by law to know the contents thereof, unless prevented by some fraudulent device.[6]

In cases where the relief is granted, it is only where the mistake is clearly and satisfactorily made to appear; for courts will always proceed upon the ground that the contract as it is should be treated as a full and correct expression of the intention of the parties until the contrary is established with reasonable certainty. When it is so established, and the right of the injured party is not impaired by a failure on his part to use proper precaution and diligence, the relief is usually granted. Contracts for the sale of land are not an exception to this general rule, but are as much amenable to its principles as are other contracts.[7]

§ 7. **Deficiency in quantity.** A purchaser is always entitled to the quantity of land for which he has bargained, and if the vendor is unable or unwilling to give it to him he is under no obligation to complete the contract. The question, in its more complicated forms, usually arises in sales of suburban property, where compact bodies of land, farms, plantations, etc., are sold under some specific name, or by a particular description, and as containing by estimation a stated number of acres. The

[1] Rothschild v. Frensdorf, 21 Mo. App. 318.
[2] Jackson v. Olney, 140 Mass. 195.
[3] Weller's Appeal, 103 Pa. St. 594.
[4] Smentek v. Cornhauser, 17 Ill. App. 266.
[5] McKinney v. Herrick, 66 Iowa, 414.
[6] Hazard v. Griswold, 21 Fed. Rep. 178.
[7] O'Connell v. Duke, 29 Tex. 299.

difficulty arises in determining whether the sale was intended to be in gross or by the acre. If the former, the authorities are unanimous in declaring that the mention of quantity of acres after another and certain description, whether by metes and bounds or other known specifications, is not a covenant or agreement as to the quantity to be conveyed, particularly if qualified by the terms "more or less," or "containing by estimation," or similar expressions. In such case the statement of acreage is regarded as mere matter of description and not of the contract; the purchaser, as a general rule, taking the risk of the quantity, provided there be no intermixture of fraud.[1]

But the effect of the words "more or less," or other expressions of similar import, added to a statement of quantity, can only be considered as intending to cover inconsiderable or small differences one way or the other,[2] and do not in themselves determine the character of the sale. Such words do not necessarily import that the purchaser takes the risk of quantity, nor can they be regarded as stipulations intended to cover any after-discovered errors;[3] and even though the sale has been in gross, and not by the acre, if it yet appears that the estimated number of acres was in fact the controlling inducement, and that the price, though a gross sum, was based upon the supposed area and measured by it, equity will interfere to grant relief and rescind the contract on the ground of gross mistake.[4] Nor does this rule do violence to any established legal principle; for where land sold is said to contain about so many acres, both vendor and vendee consider these words as a representation of the quantity which the vendor expects to sell and the vendee to purchase, else why insert them? The words "more or less" are intended to cover a reasonable excess or deficit; but if the difference between the real and the repre-

[1] Jackson v. McConnell, 19 Wend. (N. Y.) 175; Perkins v. Webster, 2 N. H. 287; Harrell v. Hill, 19 Ark. 102; Melick v. Dayton, 34 N. J. Eq. 245; Rich v. Ferguson, 45 Tex. 396; Tyson v. Hardesty, 29 Md. 309. The principle on which the rule of law is founded that gives to the purchaser the excess in ordinary cases is his liability to loss in case of deficit. His hazard of a loss is the consideration he pays for the excess. If that consideration be wanting he must rely on his express contract if he would claim an excess. O'Connell v. Duke, 29 Tex. 299.

[2] Harrell v. Hill, 19 Ark. 102.

[3] Belknap v. Sealey, 14 N. Y. 143.

[4] But see Faure v. Martin, 7 N. Y. 210; Noble v. Googins, 99 Mass. 235.

sented quantity be very great, both parties act obviously under a mistake, which it would be the duty of a court of equity to correct.[1]

While the contract remains executory these inquiries are all pertinent and proper subjects of examination and investigation, but as a general rule the acceptance of a deed and the payment of the purchase money or any part thereof closes all questions upon the agreement, which becomes merged in the conveyance and extinguished. Mutual mistake, imposition or fraud may still be shown, and if established the contract, although executed, will be set aside; but if there is no statement of quantity, the land being described only by metes and bounds, and no warranty either of the quantity of land conveyed or of the correctness of the lines as described, and there is nothing to show that any fraud or deceit has been practiced in regard to the width or length of the land, the purchaser having had opportunities as good as the vendor to ascertain the actual distances, and there afterward turns out to be a small deficiency, notwithstanding it may be regarded as a mutual mistake, yet as both parties had equal opportunities of correcting the same prior to closing the transaction, and neither having availed themselves of such opportunities, neither will be permitted to open the contract.[2]

Yet in contracts for the sale of land the same good faith is required and the same responsibility attaches to a violation which the law prescribes in every species of contract. If through fraud or gross and palpable mistake, more or less land should be conveyed than was in the contemplation of the vendor to part with or the purchaser to receive, the injured party would be entitled to relief in like manner as he would be for an injury produced by a similar course in a contract of any other species. Upon a satisfactory showing equity may interfere to vacate the contract and decree a reconveyance, or, in proper cases, to correct the conveyance or award a compensation.[3] The apparent conflict and discrepancies in the adjudicated cases arise not from a denial of or a failure to recognize this general principle, but from the difficulty of its

[1] Thomas v. Perry, 1 Pet. (U. S.) 49; Stebbins v. Eddy, 4 Mass. 414; Clark v. Munyan, 22 Pick. (Mass.) 410. Butcher v. Peterson, 26 W. Va. 447.

[2] Faure v. Martin, 7 N. Y. 210;

[3] Young v. Craig, 2 Bibb (Ky.), 270.

practical application in particular cases. "It has long since been settled," says Cook, J.,[1] "that the relative extent of the surplus or deficit cannot furnish, *per se*, an infallible criterion in each case for its determination, but that each case must be considered with reference not only to that but its other peculiar circumstances. The conduct of the parties, the value, extent and quality of the land, the date of the contract, the price and other nameless circumstances are always important and generally decisive. In other words, each case must depend upon its own peculiar circumstances and surroundings."

§ 8. Continued—Sales in gross. Where a sale is of a specific tract by name or description, each party taking the risk of quantity, the sale is said to be in gross. These sales may be classified as follows: (1) Sales strictly and essentially by the tract without reference in the negotiation or in the consideration to any designated or estimated quantity of acres. (2) Sales of the like kind, in which, though a supposed quantity by estimation is mentioned or referred to in the contract, the reference is made only for the purpose of description, and under such circumstances or in such a manner as to show that the parties intended to risk the contingency of quantity whatever

[1] O'Connell v. Duke, 29 Tex. 299. The principles to be deduced from the decided cases have been summed up by Snyder, J., in Butcher v. Peterson, 26 W. Va. 447, as follows: First. When the contract is a sale in gross for an entire sum, if it is subsequently ascertained that there is either a deficiency or an excess in the quantity of land specified therein, and it is shown that the error in quantity arose from the mutual, innocent mistake of the parties, a court of equity may, where the mistake affects the substance of the sale, rescind the contract; but in the absence of fraud, actual or constructive, in either party, such court can allow no abatement for a deficiency or compensation for any excess of land. Second. If, however, in the case of such sale, the purchaser loses a part of the land purchased by him because the vendor had no title to the part so lost, and such part is not a substantial part of the land contracted for, then neither the vendor nor the vendee can have the sale rescinded, even though the parties were mutually mistaken as to the title of the part of the land lost. But if in such case the sale is without warranty of title and the vendee refuses to rescind the sale, he will not be decreed compensation for the land so lost. Third. But if in the case last stated the vendor has warranted the title, and the portion lost is much or little, the vendee may elect to hold so much of the land as he can, and compel the vendor to abate the purchase money if unpaid, or, if paid, to make compensation for the land so lost by reason of want of title.

it might be, or how much soever it might exceed or fall short of that which was mentioned in the contract. (3) Sales in which it is evident from extraneous circumstances of locality, value, price, time and the conduct and conversation of the parties, they did not contemplate or intend to risk more than the usual rates of excess or deficiency in similar cases or than such as might reasonably be calculated on as within the range of ordinary contingency. (4) Sales which, though technically deemed and denominated sales in gross, are in fact sales by the acre, and so understood by the parties.[1] Contracts belonging to either of the two first-mentioned classes, whether executed or executory, are not susceptible of modification or rescission, in the absence of fraud; but in sales of either of the latter kinds an unreasonable surplus or deficit may entitle the injured party to relief unless he has by his conduct waived or forfeited his equity.

§ 9. **Continued — Sale of specific quantity.** Where the sale is of a specific quantity, or, as usually denominated, a sale by the acre, much less variation from the quantity intended to be conveyed would be indicative of a mistake than where a specific tract is sold by metes and bounds, the quantity of acres being mentioned merely as a matter of description. The impracticability, however, of ascertaining the exact amount with absolute precision, owing to the different results produced by different surveyors, inequality of the ground, variation of instrument, etc., will excuse a small surplus or deficit, however exactly the parties may have intended to be confined to a specific quantity; and as parties are presumed to have contracted with reference to such ordinary contingencies, and to have accepted the hazard of gain or loss, such variation would be ineffectual as a basis of relief.[2] On the other hand, where a surplus is evidently contemplated by the terms of the contract, but it turns out that the surplus greatly exceeds what was contemplated by the parties, and such excess if known would have materially influenced the contract which is to be judged of from the proof, this is a mistake against which relief will ordinarily be granted unless the injured party has been guilty of culpable negligence.[3]

[1] Harrison v. Talbot, 2 Dana (Ky.), 258.

[2] O'Connell v. Duke, 29 Tex. 299.

[3] In these cases the inquiry is first

§ **10. Defective title.** There is an implied undertaking on the part of the vendor, in every contract of sale, in the absence of express stipulations to the contrary, to produce a good or marketable title to the bargained property; and to the just fulfillment of this undertaking the vendor is strictly held.[1] This right does not spring from the contract of the parties, but is given by law, and the rule is fundamental that the purchaser will never be compelled to accept a doubtful title.[2]

But where land is sold on which there are existing incumbrances which at the time are known to the vendee, and the deed is to be given and consideration to be paid at a subsequent day, if the vendee enters into possession and pays part of the consideration, it would seem that, unless there has been some fraud or deception on the part of the vendor with respect to such incumbrances, the vendee will not be permitted to rescind or to avoid further payments. The duty of the vendor, in such cases, extends only to the execution of a proper conveyance according to the terms of the contract when the same shall become due, and if at that time he is able and willing to give a perfect and unincumbered title his covenant to convey is fully complied with.[3] If the vendee tenders

to be made whether parties have made a mistaken estimate of the quantity which materially influenced the price, and then whether, notwithstanding such mistaken estimate, they have waived their rights by an acceptance of the hazard of gain or loss by the estimate. Whenever the excess or deficiency is palpable and unreasonable, and such is shown not to have been in the contemplation of the parties, relief will be granted unless the proof shows that the hazard of gain or loss, whatever it might be, was accepted and entered into the contract. Young v. Craig, 2 Bibb (Ky.), 270; O'Connell v. Duke, 29 Tex. 299.

[1] Moulton v. Chafee, 22 Fed. Rep. 26: Hinkle v. Margerum, 50 Ind. 240; Shreck v. Pierce, 3 Iowa, 350.

[2] Ludlow v. O'Niel, 29 Ohio St. 182; Richmond v. Gray, 3 Allen (Mass.), 27; Powell v. Conant, 33 Mich. 396; Vreeland v. Blauvelt, 23 N. J. Eq. 483.

[3] So where a deed was to be given on the payment of the purchase money by instalments, and the vendee paid one instalment and took possession of the land, and declined paying the second instalment unless the vendor would give security against an existing mortgage, which the vendor declined, but offered to complete his contract, and the vendee persisting, the vendor ejected him, *held*, that the vendee could not rescind the contract, the vendor having been guilty of no fraud, and the vendee not having entitled himself to a deed. Ellis v. Hoskins, 14

the whole of the purchase price and demands a deed free from incumbrances, and the vendor is unable or unwilling to comply, then, under the rules first stated, he may elect to rescind and recover any payments made;[1] but until he has placed himself in condition to demand fulfillment of the contract he cannot be heard to complain that his vendor is in default.

An executed contract presents different features. The vendee is always chargeable with notice of the facts furnished by the records, and presumably purchases with the knowledge afforded by such notice, and accepts the title subject to whatever infirmities the records may disclose, unless his conduct has been differently influenced by some act of the vendor. But though it is his duty to investigate the title prior to purchase, and to ascertain the rights of others when such rights are actually or constructively brought to his notice, he also has a right to rely upon the statements of the vendor in relation thereto, and in so doing to forego an examination.[2] If, therefore, through misrepresentation or concealment, or by reason of the arts or devices of the vendor, whereby he has been induced to refrain from proper search, he accepts an invalid or defective title, a proper ground for equitable relief is established, and the contract may be rescinded. Nor does it matter that the purchaser has not been evicted or his possession disturbed; for if adverse rights exist which have not been barred by the limitation of the statute the purchaser cannot be compelled to remain during the time still to run in a state of doubt and uncertainty as to what moment during that time his title may be impeached.

§ 11. **Inadequacy of price.** It is no ground for rescinding a contract of sale that the price agreed to be paid appears to be excessive or inadequate;[3] for the law presumes

Johns. (N. Y.) 363. So, also, where the vendor was to give a deed on the payment of one-half the purchase money, which was to be paid two years after the agreement, and at the date of the agreement there was a mortgage which was payable before the expiration of the two years, *held*, that this did not entitle the vendee, before the expiration of the two years, to rescind the agreement. Greenby v. Cheevers, 9 Johns. (N. Y.) 126.

[1] Judson v. Wass, 11 Johns. (N. Y.) 525.

[2] Moulton v. Chafee, 22 Fed. Rep. 26.

[3] Fagan v. Schultz, 73 Ill. 529; Powers v. Hall, 25 N. H. 145; Eastman v. Plumer, 46 N. H. 464; Lee v.

that every one who is not from his peculiar condition or circumstances under disability is entitled to dispose of his property in such manner and upon such terms as he may see fit; whether his bargains are wise or foolish, profitable or unprofitable, are considerations not for courts of justice, but for the party himself to deliberate upon.[1] Indeed, it has been ruled that inadequacy of consideration is not in itself a distinct principle of equity;[2] while at law the consideration, be it more or less, will be sufficient to support the contract. The value of land is what it will bring, and admits of no precise standard. One man, in the disposal of his property, may sell it for less, or on the other hand demand more, than another similarly situated; and if courts were to attempt to equalize such contracts or interfere in transactions of this character, confusion and legal chaos would be the inevitable result. Where, therefore, there is no fraud or imposition, the parties have a right to fix the measure of value; and if they stand upon an equal footing and are in a situation to judge for themselves, the contract which they have wittingly and willingly made they must abide by.[3]

Kirby, 104 Mass. 420; Seymour v. Delancy, 3 Cow. (N. Y.) 445; Talbot v. Hooser, 12 Bush (Ky.), 408; Harrison v. Town, 17 Mo. 237; Hyer v. Little, 20 N. J. Eq. 443; Tebbs v. Lee, 76 Va. 744; Bierer's Appeal, 92 Pa. St. 265; Troy Academy v. Nelson, 24 Vt. 189; Knobb v. Lindsay, 5 Ohio, 468.

[1] Eyre v. Potter, 15 How. (U. S.) 42.

[2] Eyre v. Potter, 15 How. (U. S.) 42. In Gregor v. Duncan, 2 Desau. (S. C.) 636, the court refused to set aside an agreement for the sale and assignment of a present interest which was executed, on the ground of a mere inadequacy of price, where there was no fraud, concealment or misrepresentation, where the parties were adults, and the vendors knew as much of the situation and value of the property as the purchasers.

[3] Kidder v. Chamberlain, 41 Vt. 62; Schnell v. Nell, 17 Ind. 29; Eyre v. Potter, 15 How. (U. S.) 42; Farnham v. Brooks, 9 Pick. (Mass.) 212; Lee v. Kirby, 104 Mass. 420; Bedal v. Loomis, 11 N. H. 9; White v. McGannon, 29 Gratt. (Va.) 511; Harrison v. Town, 17 Mo. 237. Where W. was possessed of lands with the value of which he was acquainted, but on which there were incumbrances consisting of a mortgage and unpaid taxes, of which he had been made acquainted, and, being unable or unwilling to incur the expense and trouble of litigation to perfect the title, sold the same for such a price as he could obtain, which was a grossly inadequate consideration therefor, a court of equity will not, upon evidence of such facts, declare that such sale was made for an inadequate consideration, or set aside the deed on the ground of alleged fraud in the purchaser. Bowman v. Page, 11 Wis. 301.

But while mere inadequacy is not usually regarded as a sufficient ground for rescinding a contract of sale, yet if it be of so gross a nature as to shock the moral sense, or given under such circumstances as to afford a necessary presumption of fraud or imposition, a different rule will apply;[1] and even though the inadequacy be not so great in itself as to demonstrate such a want of understanding in the injured party or of oppression or abused confidence as to vitiate the contract, yet if these circumstances exist in connection with it and are taken advantage of as the means of procuring an advantageous bargain upon a consideration palpably inadequate, the contract cannot stand.[2] The inadequacy in such case is in fact only one of the evidences of fraud, and when this fact is satisfactorily established a rescission follows as a legal consequence.[3] Hence, if the contract has been obtained by one standing in a peculiar relation of trust or confidence to another;[4] or if unconscientious advantage has been taken of the distress,[5] ignorance[6] or imbecility[7] of the other; or if there

[1] Booten v. Scheffer, 21 Gratt. (Va.) 474; Mo. River R. R. v. Commissioners, etc. 12 Kan. 482; Morris v. Filliber, 30 Mo. 145. A conveyance by a father seventy-four years of age, his wife being nearly seventy years of age and in delicate health, to his two sons, of real and personal estate worth more than $9,000, taking from his sons a bond and mortgage to secure his and his wife's maintenance, and an annuity of $50 during their lives, *held* to be for a consideration grossly inadequate, it not appearing to be intended as an advancement. Whelan v. Whelan, 3 Cow. (N. Y.) 537.

[2] Cruise v. Christopher, 5 Dana (Ky.), 181; Hall v. Perkins, 3 Wend. (N. Y.) 626; Gillespie v. Holland, 40 Ark. 28; Allore v. Jewell, 94 U. S. 506; Haines v. Haines, 6 Md. 435; Hardeman v. Burge, 10 Yerg. (Tenn.) 202; Odineal v. Barry, 24 Miss. 9; Nash v. Lull, 102 Mass. 60; Knobb v. Lindsay, 5 Ohio, 468; Comstock v. Purple, 49 Ill. 158; McMullen v. Gable, 47 Ill. 67.

[3] Holmes v. Fresh, 9 Mo. 201; Kidder v. Chamberlain, 41 Vt. 62; Worth v. Case, 42 N. Y. 363; Eyre v. Potter, 15 How. (U. S.) 42; Morris v. Filliber, 30 Mo. 145.

[4] Slocum v. Marshall, 2 Wash. (C. Ct.) 379; Taylor v. Taylor, 8 How. (U. S.) 183; Kennedy v. Kennedy, 2 Ala. 571; Gillespie v. Holland, 40 Ark. 28.

[5] Lester v. Mahan, 25 Ala. 445; Udall v. Kenny, 3 Cow. (N. Y.) 590.

[6] Segur v. Tingley, 11 Conn. 134. Land worth not over $200 was sold for $600 to an ignorant woman who was unacquainted with its value by one who had been the friend and physician of her deceased husband, and to whom she was very grateful for kindness. *Held*, that the sale should be rescinded. Hunter v. Owen (Ky.), 9 S. W. Rep. 717.

[7] Cruise v. Christopher, 5 Dana (Ky.), 181; Harris v. Warmsley, 41 Iowa, 671; Mann v. Betterby, 21 Vt. 326; Allore v. Jewell, 94 U. S. 506.

have been false statements concerning the character of the consideration or medium of payment, whereby, notwithstanding the nominal price may be adequate, there has been a partial or entire failure of consideration,[1] — equity will decree a rescission and restore the parties to their original condition, even though a conveyance has been made.

§ 12. **Continued — Sales of the equity of redemption.** The subsequent release of the equity of redemption by the mortgagor to the mortgagee is a matter of common occurrence, and there is nothing in the policy of the law which forbids such transfer. But as the mortgagee, particularly if in possession, may exercise an undue and improper influence over the mortgagor, especially if the latter be in needy circumstances, the transaction will always be closely scrutinized, so as to prevent any oppression of the debtor; and it seems that only constructive fraud, or an unconscientious advantage which ought not to be retained, need be shown to avoid such a purchase.[2] If the sale be made for a fair price and a full consideration, or under circumstances where the mortgagor could exercise an unembarrassed will, the relationship of the parties would, of course, form no objection; yet courts view all transactions of this kind between mortgagor and mortgagee with considerable jealousy, and will set aside such sales whenever, by the influence of his incumbrance, the mortgagee has purchased for a consideration grossly inadequate or for less than others would have given.

§ 13. **Laches and delay.** Although time is an indispensable ingredient of every contract, it has passed into a maxim that it is not of the essence of a contract for the sale of real estate unless made so by the express agreement of the parties; and Lord Thurlow[3] is reported to have said that it could not be

[1] Hardeman v. Burge, 10 Yerg. (Tenn.) 202. Where through fraud or mistake, and against the intention of the parties, the recital of a valuable consideration finds its way into an instrument, a court of equity will admit parol evidence of the want of consideration; but such fraud or mistake must be shown in order to admit such testimony for the purpose of destroying the effect of the instrument. Whiting v. Gould, 2 Wis. 552.

[2] Russell v. Southard, 12 How. (U. S.) 139; Pugh v. Davis, 96 U. S. 337; Holdridge v. Gillespie, 2 Johns. Ch. (N. Y.) 34; Oliver v. Cunningham, 7 Fed. Rep. 689.

[3] Gregson v. Riddle, 7 Ves. (Eng. Ch.) 268.

made so even by a positive stipulation; but this doctrine is not now admitted to be law either in England or America. It is certain, however, that in former times courts of equity carried this doctrine of the non-essential character of time to extreme and unwarranted lengths; and the tendency of modern decisions has been to restrict it, or at least to bring it within such moderate bounds as seem clearly indicated by the principles of equity and by a reasonable regard to the convenience of mankind as well as to the common accidents, mistakes, infirmities and inequalities belonging to all human transactions.[1]

That time may be made of the essence of the contract by the express stipulation of the parties is now the universal rule;[2] but it may also become such, without an express agreement, by the nature of the contract itself or of the circumstances under which it was made;[3] as where the benefit to accrue from the consideration to be paid or the conveyance to be executed materially depends upon a strict performance in point of time.[4] Again, although there is no stipulation that time shall be essential, nor anything in the nature or circumstances of the agreement to make it so, it may nevertheless be made essential by the proper action of a party who is not in default and is ready to perform, if the other party is in default without justification.[5] Thus, if the vendee, without sufficient excuse, fail to pay at the stipulated time, and the vendor is in no default, and is ready and able to perform all that the contract requires of him, he may notify the vendee to pay within a reasonable time or he will consider and treat the contract as rescinded. In such case, if payment be not made within a reasonable time, the vendor has a right to treat the contract as abandoned by the vendee. In like manner and with like

[1] 2 Story's Eq. Jur. § 780.

[2] Kimball v. Tooke, 70 Ill. 553; Barnard v. Lee, 97 Mass. 92; Kirby v. Harrison, 2 Ohio St. 326; Mason v. Payne, 47 Mo. 517; Davis v. Stevens, 3 Iowa, 158; Reynolds v. R. R. Co. 11 Neb. 186; Bullock v. Adams, 20 N. J. Eq. 367; Jennison v. Leonard, 21 Wall. (U. S.) 303.

[3] Hutcheson v. McNutt, 1 Ohio, 18.

[4] Kirby v. Harrison, 2 Ohio St. 325. Where land is purchased for the purpose of expending large sums of money thereon in building, and the fact is understood by the parties to the contract when making it, time becomes of the essence of the contract. Gilman v. Smith (Md.), 17 Atl. Rep. 1035.

[5] Rummington v. Kelley, 7 Ohio, 2; King v. Ruckman, 20 N. J. Eq. 316.

consequences, the vendee may notify the vendor if the latter is in default and the former is not.[1] So, too, although there has been no express notice of rescission, yet where an application has been made for a specific performance, and the party so applying has omitted to execute his part of the contract by the appointed time, and is unable to assign any sufficient justification therefor, and there is nothing in the acts or conduct of the other party that amounts to an acquiescence in such delay, specific performance will be denied;[2] and, in general, where a specific execution would be refused, a rescission will be decreed. This is almost invariably the case where by reason of the delay the circumstances or value of the property have materially changed.

Where the payment of the purchase money, or any part thereof, and the making or tender of the deed are to occur simultaneously, the one as it were dependent on the other, they are regarded as mutual and concurrent acts, which disable either party from putting an end to the contract without performance or a valid offer to perform on their part.[3] The covenants being mutual and dependent, neither party can insist upon performance by the other without performance or readiness to perform on his part, and conversely the same conditions must exist to place either in default.[4] So far as the question of time is concerned, both parties, after the day provided for consummation, may be considered equally in default; and neither can hold himself discharged from the obligation

[1] Kirby v. Harrison, 2 Ohio St. 326. Where A. made a contract with B. to deed him certain real estate within one year, and on the third day after the expiration of the year he made such deed and tendered it to B., *held*, that A. was not in default for not making the deed before, as a vendor in such case is not in default until the party entitled to the deed has demanded it and waited a reasonable time for it. Dye v. Montague, 10 Wis. 18.

[2] Benedict v. Lynch, 1 Johns. Ch. (N. Y.) 374.

[3] Johnson v. Jackson, 27 Miss. 498; Crabbtree v. Leavings, 53 Ill. 526.

[4] Walton v. Wilson, 30 Miss. 580; Headly v. Shaw, 39 Ill. 367. But where the vendor was to convey when the vendee should deliver a bond and mortgage for the purchase money, and four years afterward the vendee insisted on the agreement, and a year afterward offered to perform it on his part, *held*, that the contract should be presumed to be rescinded, although the vendor had been previously incapacitated from performing his agreement. Ballard v. Walker, 3 Johns. Ch. (N. Y.) 60.

of complete performance until he has tendered performance on his own side and demanded it on the other.

§ 14. Abandonment — Failure to perform. A neglect of either party to perform the conditions of the agreement at or within the time or times stipulated, as non-payment on the one hand or non-delivery on the other, may in many instances amount to or at least be evidence of an intention wholly to abandon the contract, and by such neglect or refusal place it within the power of the other party, where he is not also derelict, to avoid it or not at his pleasure. It is not, however, a mere slight or partial neglect or omission of one of the contracting parties to do something which he ought to do, or to the performance of which he has obligated himself, that will justify the other in repudiating the contract or suing for a rescission. As a rule, the failure of the opposite party must be a total one; there must be an absolute refusal or evidence of inability, unless time has been made an essential element, so that the object of the contract shall have been defeated or rendered unattainable by reason of the misconduct or default.[1]

For partial dereliction and non-compliance in matters not necessarily of the first importance to the accomplishment of the object of the contract, the party injured must seek his remedy upon the stipulations of the contract itself.[2]

§ 15. Destruction of the subject-matter. It is a rule in the sale of chattels that if at the time of sale the subject-matter be actually destroyed, although the fact is unknown to the parties, neither party will be bound thereby. Real estate, being practically indestructible, presents somewhat different features; yet, while land may always remain, the appurtenances and improvements in many cases give to it its chief value. If these are destroyed, as they may be, why should

[1] Weintz v. Hafner, 78 Ill. 27; Gregg v. English, 38 Tex. 139.

[2] Thus, where a party sold a farm, and agreed to build a barn on the premises and deliver possession by a given day, it was held that a failure to have the barn completed at the time the second payment fell due and before the time of delivery of possession did not justify the purchaser in refusing payment, and authorize him to recover the sum paid at the making of the contract. Neither would a refusal to give a receipt for the second payment justify a rescission by the purchaser, even if one were required by the contract. Weintz v. Hafner, 78 Ill. 27.

not the rule apply? Certainly there can be no impropriety in the application; for if a person should sell an improved lot, the improvement fixing the price and forming the chief inducement to the purchase, and the parties proceeding upon the belief that the improvement existed, when in fact it had been consumed by fire, it is clear that no binding contract could arise.[1]

A loss occurring after the execution of the contract of sale and prior to its final completion presents different features and is governed by different rules. The vendee, in such case, having become in equity the owner of the property, the vendor holds it only as his trustee, and with a right to retain it only until the purchase money shall have been paid. Whatever advantage may thereafter arise to it will inure to the benefit of the vendee, and conversely, whatever loss may befall it he must sustain. The vendor has practically no further interest in it except as a security for the purchase money, and will neither lose nor gain by any change that may occur to it.[2] If during this interval all or any portion of the improvements are destroyed by fire, flood or other agency, it is the property of the vendee that is lost; the vendor loses nothing, and the vendee will still be obliged to take the property and pay the purchase money.[3] Nor is there any harshness or injustice in the rule. The vendee may to a great extent protect himself against loss. He has an insurable interest in the property, of which he may avail himself;[4] and even though he does not, and the loss is total, it is simply one of the risks which every owner of property must take as an incident to such ownership.

§ **16. Fraud.** Probably no other circumstance is so often assigned as a reason for the rescission of contracts or cancellation of deeds as that peculiar quality or condition which, for the want of a better term, is called fraud. Fraud is a word of wide signification, and for which courts of equity, though they often construe it, have never ventured to give us an exact

[1] Thompson v. Gould, 20 Pick. (Mass.) 139.

[2] Reed v. Lukens, 44 Pa. St. 200.

[3] Snyder v. Murdock, 51 Mo. 175; Brewer v. Herbert, 30 Md. 301.

[4] Hough v. Ins. Co. 29 Conn. 10; Lorillard Ins. Co. v. McCulloch, 21 Ohio St. 176.

definition; indeed, it seems to be a part of the equity doctrine of fraud not to define it, or to formulate any rule as to its nature, lest the craft of men should find ways of committing fraud which might escape the limits of such a rule or definition. It is not in its nature discernible by the direct evidence of the senses, being susceptible neither of ocular observation nor physical demonstration, and indeed cannot be said to have any material existence. In its practical application it includes all acts, omissions or concealments which involve a breach of legal or equitable duty, trust or confidence justly reposed, and are injurious to another, or by which an undue and unconscientious advantage is obtained; and its existence may be proved either by intrinsic evidence of unfairness in the transaction itself, or by evidence of facts and circumstances attending it, which, by the ordinary tests from which we judge of the motives to action, appear inconsistent with an honest purpose. Wilful misrepresentation of material facts, made with the design to deceive another, and to induce him to enter into a negotiation he would not otherwise do; or the suppression of fact in a matter material to be known in a transaction pending; or any unconscionable device, whereby an advantage is obtained over the weakness, ignorance and distress of another, will in each instance enable the party who has been overreached to annul the contract and obtain a restoration of his original rights.[1]

But to justify a court of equity in rescinding a contract of sale or avoiding a deed made thereunder, the fraud, or the circumstances which tend to show it, must be clearly proved. The policy of the law is to uphold contracts, and a transaction fair and honest upon its face must be regarded as free from

[1] Vandyke v. Walters, 88 Ill. 444; Allen v. Hart, 72 Ill. 104; Brown v. Burbank, 64 Cal. 99; Ashton v. Thompson, 32 Minn. 25; Kleeman v. Peltzer, 17 Neb. 381. K., having a contract with S. for the purchase of certain lands at $10 per acre, falsely represented to S., who was ignorant of the value and situation of the lands, that they were worth far less, and thereby procured a new contract for $8 per acre, and made part of the payments; when S., learning the facts, rescinded the contract, and K. filed a bill for a specific performance. *Held*, that such contract was voidable at the option of S. for the fraud, but that K. was entitled to have the amount of purchase money paid refunded to him. Kelly v. Sheldon, 8 Wis. 258.

fraud until some kind of competent evidence has been adduced to show that it is tainted. Hence it is said that "fraud cannot be presumed, but must be proved;"[1] and this expression has passed into a legal maxim. This is not strictly accurate, however, as fraud may be and often is presumed, but is true in that the facts constituting the fraud must be proved, and that their existence cannot be presumed; nor can the presumption be raised in the absence of all proof.[2]

It is a further principle that a fraud must relate to facts then existing or which had previously existed; hence, it is said, non-performance of a promise made in the course of negotiations is not of itself either a fraud or the evidence of a fraud,[3] although it would seem this rule does not obtain in a class of cases where the promise is the device resorted to for the purpose of accomplishing the fraud.[4]

Again, it is not only necessary to establish the fraud by clear proof, but it must also relate to a material matter or one important to the interests of the complaining party;[5] for if it is of an immaterial thing, or if the other party did not trust to it, or if it was the expression of a matter of opinion or of fact equally open to the inspection of both parties, and in regard to which neither could be presumed to trust the other, there is no need for equity to interfere or to grant relief on the ground of fraud.[6]

Fraud is not alone of equitable cognizance, however, for courts of law have jurisdiction as well; yet the character of fraud of which a court of law takes notice is entirely different from that against which a court of equity will grant relief. As a rule, the only fraud which can be shown at law to avoid a deed or the effect of its covenants is a fraud in the execution,

[1] Farmer v. Calvert, 44 Ind. 209; Strausse v. Kranert, 56 Ill. 254; Nichols v. Patten, 18 Me. 231.

[2] Farmer v. Calvert, 44 Ind. 209.

[3] Adams v. Schiffer, 11 Colo. 15; Knowlton v. Keenan, 146 Mass. 86. Compare Henderson v. R. R. Co. 17 Tex. 560.

[4] As where one buys property with the existing intention not to pay for it. And see Dow v. Sanborn, 3 Allen (Mass.), 182; Dowd v. Tucker, 41 Conn. 203; Richardson v. Adams, 10 Yerg. (Tenn.) 273; Gross v. McKee, 53 Miss. 583.

[5] Adams v. Schiffer, 11 Colo. 15. Fraud which is independent of the transaction in question does not vitiate it. Emerson v. Smith, 51 Pa. St. 90; Blair v. Buttalph, 72 Iowa, 31.

[6] Tuck v. Downing, 76 Ill. 71.

as where it was untruly read; or where there has been a substitution of one instrument for another; or where by some device an instrument has been obtained which the party defrauded did not intend to give. But misrepresentation of collateral facts, fraud in the consideration, etc., form no defense at law.[1]

In avoiding a deed at law courts proceed upon the principle that the instrument in question never had any legal existence; as where a person by fraud and circumvention is led to sign a paper he never had any intention of signing, or a different paper has been surreptitiously substituted for the one he did intend to sign;[2] or that the instrument was fraudulently made with intent to defraud and defeat the grantor's creditors, the illegality of the consideration making it void *ab initio*.[3]

§ 17. Concealment. "Moral writers," observes Mr. Sugden,[4] "insist that a vendor is bound, *in foro conscientiæ*, to acquaint a purchaser with the defects of the subject of the contract;" and subsequent commentators have, in several instances, gone so far as to regard this as a rule of law.[5] There can be no doubt that a contract, to be obligatory, must be justly and fairly made, and the contracting parties are bound to deal honestly and act in good faith each with the other; hence, the intentional non-disclosure of material facts and circumstances, which, if known to the vendee, would have prevented him from making the purchase, will in many cases afford ground for relief in equity.[6] It is essential, however, that such concealment should be of facts which the concealing party is under some legal or equitable obligation to disclose to the other, not merely *in foro conscientiæ*, but as a matter of legal right,[7] and in

[1] Burrows v. Alter, 7 Mo. 424; Truman v. Love, 14 Ohio St. 144; Holly v. Younge, 27 Ala. 203; Jones v. Emery, 4 N. H. 348; Stephens v. Judson, 4 Wend. (N. Y.) 471; Hopkins v. Beard, 6 Cal. 661; Reservoir Co. v. Chase, 14 Conn. 123; Andrews v. Hill, 20 Miss. 679; Rogers v. Colt, 21 N. J. L. 704.

[2] Escherick v. Traver, 65 Ill. 379; Obert v. Hammel, 18 N. J. L. 73; Schuylkill v. Copley, 67 Pa. St. 386; Wood v. Goodrich, 9 Yerg. (Tenn.) 266; Truman v. Love, 14 Ohio St. 144; Halley v. Younge, 27 Ala. 203.

[3] Owen v. Arvis, 26 N. J. L. 22.

[4] 1 Sug. on Vend. 1.

[5] 2 Kent's Com. 482.

[6] Mitchell v. McDougal, 62 Ill. 498; Ruffner v. Ridley, 81 Ky. 165; Brown v. Montgomery, 20 N. Y. 287.

[7] Mitchell v. McDougal, 62 Ill. 498; Knitzing v. McElrath, 5 Pa. St. 467; Brown v. Montgomery, 20 N. Y.

respect to which he cannot innocently be silent.[1] When these facts concur, a court of equity will not enforce or carry into effect a contract thus unfairly made; and, if the injured party invokes its aid in proper time, such contract will be rescinded and the parties restored to their original rights.

But the law does not require that both parties should be equally wise, nor that either should impart to the other his own knowledge. It does insist that both parties shall have equal means of knowledge or the ascertainment of particular facts, but throws upon the parties themselves the burden of the acquisition.[2] It demands that the parties shall exercise toward each other in their dealings the utmost good faith, but the ignorance of one is not of itself a fraud on the part of the other.[3] Where, therefore, no relations of confidence exist, and the parties otherwise stand on equal footing, mere passive concealment or silent acquiescence in the self-deception of the other will not furnish grounds for the avoidance of the contract.[4] To effect this there must be active participation; the withholding of information asked for,[5] or some artifice or device to mislead.[6] Such would seem to be the rule sustained

287; Paddock v. Strobridge, 29 Vt. 470; Swimm v. Bush, 23 Mich. 99; Roseman v. Canovan, 43 Cal. 110.

[1] Conner v. Wardell, 7 C. E. Green (N. J.), 498; Fish v. Cleland, 33 Ill. 243. Thus, in a contract for exchange of lands, where one party acts with full knowledge as to his own property as well as to the other property for which he is bargaining, while the other party, on account of non-residence, can scarcely be said to know his own property, and he knows nothing whatever of the property he is trading for, the informed party is held to the strictest and fullest disclosures. Merriam v. Lapsley, 12 Fed. Rep. 457.

[2] Harris v. Tyson, 24 Pa. St. 347.

[3] Williams v. Spurr, 24 Mich. 335; Harris v. Tyson, 24 Pa. St. 347; Law v. Grant, 37 Wis. 548.

[4] Hanson v. Edgerly, 29 N. H. 343; Fisher v. Budlong, 10 R. I. 525; Williams v. Spurr, 24 Mich. 335; Smith v. Countryman, 30 N. Y. 655; Law v. Grant, 37 Wis. 548. Every man must bear the loss of a bad bargain legally and honestly made; if not, he could not hope to enjoy in safety the fruits of a good one. Harris v. Tyson, 24 Pa. St. 347.

[5] Kohl v. Lindley, 39 Ill. 195; Watson v. Riskamere, 45 Iowa, 233; Coleman v. Burr, 93 N. Y. 31.

[6] Where the vendee applied to the vendor to purchase a lot of wild land, and represented to him that it was worth nothing except for the purpose of a sheep pasture, when he knew there was a valuable mine on the lot, of the existence of which the vendor was ignorant, *held*, that this was such a fraud as would avoid the

by the volume of authority, yet all the authorities concur in the further rule that very little is sufficient to affect the application of the principle; and it has been said by one distinguished jurist[1] that if a word — a single word — be dropped which tends to mislead the other party, the principle will not be allowed to operate. Certain it is that if either party does any act or makes any declaration with the intention of misleading the other and preventing him from ascertaining the real situation or value of the property, and at the same time conceals from him a fact which he knows to be material, he is guilty of fraudulent deception.[2]

§ 18. **Misrepresentation.** In its legal signification misrepresentation is usually a fraudulent artifice resorted to for the purpose of enhancing the price or more speedily effecting a sale of the commodity offered. The element of fraud, however, is only incidental; for, as a rule, all representations which are untrue and which materially affect the value of the property which forms the subject of the contract will furnish grounds for a rescission, even though they may not have been made with a fraudulent intent.[3] A party selling land or other property must be presumed to know whether the representations made by him are true or false; and if he does know them to be false he is guilty of positive fraud, but if he does not know it must be from gross negligence; and false representations which are material, made under such circumstances, although founded on mistake in contemplation of a court of equity, constitute fraud, and will justify the rescinding of the contract.[4] But to avoid a contract of sale on the ground of

purchase. Livingston v. Iron Co. 2 Paige (N. Y.), 390.

[1] Lord Eldon.

[2] Livingston v. Peru Iron Co. 2 Paige (N. Y.), 390; Martin v. Jordan, 60 Me. 531; Simar v. Canaday, 53 N. Y. 298; Coon v. Atwell, 46 N. H. 510; Reid v. Flippen, 47 Ga. 273; Sieveking v. Litzler, 31 Ind. 14; Allin v. Millison, 72 Ill. 201; Faribault v. Sater, 13 Minn. 223; Cruess v. Fessler, 39 Cal. 336.

[3] Allen v. Hart, 72 Ill. 104; Hammond v. Pennock, 5 Lans. (N. Y.) 358; Baptiste v. Peters, 51 Ala. 158; Bennett v. Judson, 21 N. Y. 238; Pendarvis v. Gray, 41 Tex. 326; Parmlee v. Adolph, 28 Ohio St. 10; Mulvey v. King, 39 Ohio St. 491; Linhart v. Foreman, 77 Va. 540; Wilcox v. Wesleyan University, 32 Iowa, 367; Alverez v. Brannan, 7 Cal. 503.

[4] Miner v. Medbury, 6 Wis. 295.

misrepresentation the false statements must have been of some material fact[1] constituting an inducement to the contract,[2] and which, having been relied upon,[3] have operated to the damage or injury of the party who assigns it as a reason for non-performance.[4]

The right of rescission may be asserted by the injured party where the representations have been made either by the opposite principal to the transaction or his duly-constituted agent;[5] but false statements and misrepresentations by third persons whose opinions have been sought with reference to the quality, quantity, value, etc., of the property are not available in support of a rescission where they do not act as the agents of the opposite party, or in his interest or at his request.[6] It would seem, however, that where a vendor knows when he effects the sale that the purchaser has been induced to buy by the false and fraudulent representations of a third person he is responsible for the fraud, even though such third person was not his agent.[7] In like manner statements made to third parties by the vendor in the presence of the purchaser, and with refer-

[1] Wilson v. Strayhorn, 26 Ark. 28; Grant v. Fellows, 58 Ill. 242; Risch v. Van Lillienthal, 34 Wis. 250; Pratt v. Philbrook, 33 Me. 17; Wolfe v. Pugh, 101 Ind. 293.

[2] Lynch v. Mercantile Trust Co. 18 Fed. Rep. 486; James v. Hodsden, 47 Vt. 127; Shackelton v. Lawrence, 65 Ill. 175; Adams v. Schiffer, 11 Colo. 15.

[3] Bennett v. Judson, 21 N. Y. 238; White v. Sutherland, 64 Ill. 181; Gunby v. Sluter, 44 Md. 237; Wilcox v. University, 32 Iowa, 367; Brown v. Bledsoe, 1 Idaho (N. S.), 746.

[4] Hull v. Fields, 76 Va. 594; Hickey v. Drake, 47 Mo. 369. The question of *fraudulent* misrepresentations and the liability of the person making them to respond in damages is reserved for further consideration. See chapter XXXV, *infra*, "Damages."

[5] Lynch v. Mercantile Trust Co. 18 Fed. Rep. 486.

[6] Lindsey v. Veasy, 62 Ala. 421; Hopkins v. Sneadaker, 71 Ill. 449; Crist v. Dice, 18 Ohio St. 536. A party, before closing a contract for the exchange of city property in Illinois for land in the state of Indiana, agreed to be governed by the report of a third person who had bought an adjoining tract as to its quality, value, etc. Such person, acting as the agent of the said party, examined the land and made report to his principal, upon which the contract was closed. *Held* that, in the absence of proof of any collusion between the agent and the other party, the contract could not be set aside upon the ground of alleged fraudulent representations, even if false statements were made by the agent in regard to the quality of the soil and extent of improvements on the land, or value of the premises. Schramm v. O'Conner, 98 Ill. 539.

[7] Law v. Grant, 37 Wis. 548.

ence to the land he is about to sell, are equivalent to statements made to the purchaser himself.[1]

The principles involved in the foregoing remarks are applicable to all kinds of misrepresentation, whether of the attributes of the land itself or of other circumstances not connected with the land, but which nevertheless serve as the motive for the contract, and have reference as well to the vendee as the vendor. Thus, if a person is induced to execute a deed for land through the false representations of a third person having no authority to act for the grantee, and the latter had no knowledge that such representations had been made prior to receiving the deed, nor any person authorized to act for him, the grantee will not be affected by such fraudulent representations.[2]

False representations by the vendor as to the nature, quantity or quality of the property,[3] or of the title by which it is held,[4] will entitle the vendee to a rescission of the contract. But representations, however false, in respect to the subject which is mere matter of opinion,[5] as estimates of value;[6] of the quantity

[1] Alexander v. Beresford, 27 Miss. 747.

[2] As where a wife executed and acknowledged a deed conveying her land to a bank whose money her husband had embezzled to a large amount to save him from arrest and criminal prosecution, and it appeared that the wife was urged to make the conveyance by her husband and brother, who informed her that if she would do so the bank would not prosecute, and the bank had no knowledge of any such representations being made to induce the execution of the deed, nor authorized any to be made, and none of its officers had any conversation with the grantor on the subject, it was held that a court of equity would not set the deed aside for fraud, duress or imposition. Compton v. Bank, 96 Ill. 301.

[3] Yost v. Shaffer, 3 Ind. 331; Wolfe v. Pugh, 101 Ind. 293; Martin v. Jordan, 60 Me. 531; Smith v. Robertson, 23 Ala. 312; Underwood v. West, 43 Ill. 403; Thomas v. Beebe, 25 N. Y. 244; Mitchell v. Moore, 24 Iowa, 394; Parrett v. Schaubhut, 5 Minn. 323; Keating v. Price, 58 Md. 532; Haynes v. Harper, 25 Ark. 541.

[4] Green v. Chandler, 25 Tex. 148; Gray v. Bartlett, 26 Pick. (Mass.) 186; Prout v. Roberts, 32 Ala. 427; Crutchfield v. Danilly, 16 Ga. 432; Bonner v. Herrick, 99 Pa. St. 295. Nor will the fact that the infirmity of title is apparent of record vary the rule; for in such case the vendee has a right to rely upon the representations of the vendor, upon the assumption that he knows the situation of his own property and truly represents it, and the doctrine of *caveat emptor* will not apply. Keifer v. Rogers, 19 Minn. 32; Babcock v. Case, 61 Pa. St. 427; Pryse v. McGuire, 81 Ky. 608.

[5] Tuck v. Downing, 76 Ill. 71; Holbrook v. Conner, 60 Me. 578.

[6] The law presumes that each party

of wood there is on land;[1] the productiveness of the soil,[2] etc., are insufficient in themselves; for every person reposes at his peril in the opinion of others when he has equal opportunity to form and exercise a correct judgment of his own.[3] Nor does it seem that false statements of the sums which were paid for lands,[4] or of the returns from the annual produce thereof,[5] there being no evidence of mental incapacity in the party relying on such statements other than that afforded by the transaction itself, can be made available for the purpose of avoiding the sale. Particularly is this true where the party relying on such statements has a full knowledge of the value of the property, or is personally familiar and acquainted with the same, and has had reasonable opportunities of informing himself as to its condition.[6] But while expressions of opinion as to the value of the property, whether true or false, will not constitute fraud where the parties stand on an equal footing—yet if the purchaser resides near the property and has full knowledge of its situation and approximate value, and the owner resides in another state, without any knowledge on the subject, opinions of value by the purchaser which he knows to be much below the real value of the property will be sufficient, where the property was purchased for a grossly inadequate consideration, to set aside and cancel the deed.[7]

With respect to material statements concerning the character of the land, an entire harmony of opinion does not prevail, particularly when the representations are made for the purpose of misleading the other party. It would seem, however, that the same general principles would apply in cases of false representations as in those of warranty; that is, if the prop-

to a contract of sale relies upon his own judgment as to the value of the property sold, where the facts on which the value of the property depends are known to both. Speiglemeyer v. Crawford, 6 Paige (N. Y.), 254.

[1] Longshore v. Jack, 30 Iowa, 298; Mooney v. Miller, 102 Mass. 217.

[2] Crown v. Carriger, 66 Ala. 590.

[3] Mitchell v. Zimmerman, 4 Tex. 75.

[4] Banta v. Palmer, 47 Ill. 99.

[5] Wiest v. Gorman, 4 Houst. (Del.) 119; Crown v. Carriger, 66 Ala. 590.

[6] Brooks v. Hamilton, 15 Minn. 26; Shackelton v. Lawrence, 65 Ill. 175; Slaughter v. Gerson, 13 Wall. (U. S.) 379; Crown v. Carriger, 56 Ala. 590. But if the purchaser has been fraudulently induced to forbear inquiry as to the truth of such representations a different rule will prevail. Brown v. Bledsoe, 1 Idaho (N. S.), 746.

[7] Morgan v. Dinges, 23 Neb. 271; Swimm v. Bush, 23 Mich. 99.

erty is not present the purchaser may rely on the representation, but if the purchaser is in view of the property and nothing is said or done by the vendor to induce him not to examine it, and the falsity of the representation is palpable to the senses, the purchaser cannot be permitted to omit examination and justify his own omission by the representation.[1] But although the purchaser will be held to a reasonable degree of diligence when the property is open for his inspection and will be bound by a bargain which is apparently the result of his own judgment and sagacity, yet if when on the land the vendor, in answer to inquiries, makes false statements in regard to its character, and the purchaser at the time is unable to ascertain from appearances the falsity of such assertions, the rule of *caveat emptor* should not, and it seems does not, apply. The owner of land must be supposed to be peculiarly cognizant of the character of what he offers for sale, and a stranger coming to buy has both a natural and legal right to look to him for such information and to expect the truth.[2]

It is to be observed, however, that the principles under discussion and to which allusion has been made in the preceding sentences of this paragraph have reference only to misstatements or representations of material facts. If the alleged fraudulent statements constitute a representation of the law

[1] Vanderwalker v. Osmer, 1 Thomp. & C. (N. Y.) 50. In this case plaintiff purchased a farm from defendant. He testified that in the city of Watertown, previous to the purchase, defendant told him that there were no daisies on the farm. Afterward he visited the farm, when he asked defendant if there were daisies on it, and was told there were none. He looked over the farm, but did not examine to see if there were daises, and relying on defendant's statements made the purchase. *Held*, that while plaintiff might have relied on defendant's statement made at Watertown, it was his duty while on the farm to make a personal examination as to the existence of daisies, and if daisies could have been seen at that time he could not claim to have been misled by defendant's statement. See, also, Shackelton v. Lawrence, 65 Ill. 175, in which, upon the trial of an issue on a plea of failure of consideration arising from a breach of warranty by the plaintiff as to the quantity of land sold in growing crops, it was *held* that if the statements of the plaintiff were made *only* as statements of opinion, and not as representations of fact upon which the defendant might rely as an inducement to the purchase, and, if further, the parties had equal means of information as to the truth of the assertion, then the defense would fail.

[2] Alexander v. Beresford, 27 Miss. 747; Mitchell v. Zimmerman, 4 Tex. 75.

rather than a misrepresentation of any fact, they will not, under most circumstances, amount to such a fraud as a court of equity will take cognizance of, or which would justify a court in sustaining a bill for rescission or cancellation. As a reason for this it is said that all persons are presumed to know the law, and that a statement as to the same is to be regarded more as the expression of an opinion than the assertion of a fact.[1] It is not contended that there may be no case of misrepresentation in regard to the law where a court of equity would not intervene; and there can be no doubt that if a party should intentionally deceive another by a false statement under circumstances clearly fraudulent, or, knowing him to be ignorant of it, should thereby knowingly take advantage of his ignorance for the purpose of deceiving him, a court of equity would grant relief on the ground of fraud. But ordinarily ignorance of law will not excuse, and unless there are concurrent circumstances tending to establish bad faith within the usual legal definitions, a misstatement of the law will not amount to fraud.

While false representations as to existing facts will generally be effectual as grounds upon which to base a rescission, it seems that the same principles will apply under certain circumstances where the fraudulent representations relate wholly to future acts. So where one is induced to enter into a contract or to make a conveyance upon the faith of the promises and representations of the other party as to certain acts to be performed in the future, and the party so promising neglects or wholly refuses to comply with his promise or to perform the acts in relation thereto, a rescission may be decreed on a return or tender of the purchase money or other equitable basis.[2]

[1] Upton v. Tribilcock, 91 U. S. 50; Grant v. Grant, 56 Me. 573. In Fish v. Cleland, 33 Ill. 243, the principle is expressed in these words: "A representation of what the law will or will not permit to be done is one on which the party to whom it is made has no right to rely; and if he does so, it is his folly, and he cannot ask the law to relieve him from the consequences. The truth or falsehood of such a representation can be tested by ordinary vigilance and attention. It is an opinion in regard to the law, and is always understood as such."

[2] As where a vendee purchased and received possession of a lot, he at the same time agreeing to erect a house thereon of a certain description or to cost a certain price and afterwards

§ 19. Fraudulent or improper acts of agent. Reference has been made, in that part of the work treating of agents and brokers, to the rights of a defrauded principal where his agent has acted adversely to his interests or in the secret employment of the other party.[1] The policy of the law does not permit an agent to assume incompatible or inconsistent duties; and when he attempts to enter into obligations or relations involving such duties without the knowledge and assent of his principal, he commits a fraud which vitiates the transaction, and the principal on learning of the fraud may repudiate and rescind the contract his agent has made.[2] It is immaterial whether the agent acts in his own interest or in the interests of another; for the law presumes that in every case of agency the agent shall bring to his principal his undivided and exclusive efforts in effecting the subject-matter of his commission. Hence it is that he cannot make a valid contract respecting the subject-matter to which the agency relates, or where he has a personal interest; and to avoid a contract made under such circumstances it is not necessary for the principal to show that an improper advantage has been gained over him or that he has suffered by the transaction; and the principal will have his option to repudiate or to affirm the contract irrespective of any proof of actual fraud.[3] Nor will the agent be permitted to assume double employment and act for both buyer and seller at the same time; and when the agent endeavors to act in such dual capacity he not only forfeits his right to compensation from either principal, but the contract he has made may

neglected so to do, *held*, that the vendor was entitled to a rescission. Willard v. Ford, 16 Neb. 543. So, too, where the plaintiff, a married man, was induced to convey land to defendant by her fraudulent representation that she loved him and would marry him on his securing a divorce, and that the conveyance was necessary to stop her children's opposition. She subsequently refused to marry him. *Held*, that he was entitled to have the deed set aside although it was not executed until after he obtained his divorce. Douthitt v. Applegate, 33 Kan. 395.

[1] See ch. VII, *ante*.

[2] Scribner v. Collar, 40 Mich. 375; Bell v. McConnell, 37 Ohio St. 396; Meyer v. Hanchett, 39 Wis. 419; Raisin v. Clark, 41 Md. 158; Lynch v. Fallon, 11 R. I. 311; Walker v. Osgood, 98 Mass. 348; Hegenmyer v. Marks, 37 Minn. 6; Wassell v. Reardon, 11 Ark. 705.

[3] New York, etc. Ins. Co. v. National Ins. Co. 14 N. Y. 85; Barry v. Schmidt, 57 Wis. 172; Atlee v. Fink, 75 Mo. 100.

be avoided by either or by the innocent party in case of a guilty participation by one of the contracting parties.

§ 20. Recriminatory fraud as a defense. While fraud is considered as a vitiating element in all contracts, and when advanced as a ground for rescission will, if proved, warrant a complete abolition of the contract and a restoration of the parties to the positions respectively occupied by them prior to the execution of the agreement, yet it may, under some circumstances, be resorted to as a recriminatory defense in an action brought to set aside a deed. In this respect it is employed generally in that class of cases relating to conveyances of land which have been made for the purpose of defeating or defrauding creditors.

It has been held, in general terms, that in an action for the rescission of a contract on the ground of defendant's fraud, the defendant cannot set up the fraud of the plaintiff as a defense; but this applies only where one independent deceit or fraud is attempted to be set off against another deceit or fraud, so as on that account to estop the maintenance of a suit. Where two or more are jointly concerned in the perpetration of one and the same fraud — a conspiracy or combination to accomplish an illegal object through fraud by which some third person is to suffer — the doctrine cannot be said to apply; and where, as in the case of a fraudulent conveyance to defeat the claims of creditors, an effort is thereafter made to rescind the contract, the fraud of the grantor may be shown to defeat the relief asked for, upon the principle that courts will not interfere between parties equally guilty to adjust their controversies or apportion their rights accruing from an illegal, immoral or fraudulent enterprise.[1]

With respect to collateral questions growing out of transactions of this character there seems to have been much discussion and not a little controversy, particularly in regard to executory contracts, and there are numerous decisions for and against the right of the grantor to sue for and collect the notes or other evidences of debt which may have attended the fraud-

[1] Hardy v. Stonebreaker, 31 Wis. 647; Jackson v. Garnsey, 16 Johns. (N. Y.) 189; Drinkwater v. Drinkwater, 4 Mass. 355; Walton v. Trusten, 49 Miss. 569; Shank v. Simpson, 114 Pa. St. 208.

ulent contract as incidents. With this phase of the subject, however, the present inquiry has nothing to do.

The general rule with respect to fraudulent conveyances now is that, notwithstanding the fraud, the transaction is valid as between the parties,[1] and the rule is the same both at law and in equity.

§ 21. **Duress.** The law requires, as an essential ingredient of every contract, the free assent of the contracting parties. Hence no rights can be acquired under promises extorted by acts of violence or contracts entered into through compulsion or fear. This has been the settled rule of law for more than three centuries, and prevails in every civilized nation. Contracts entered into under such circumstances are said to be made under duress.

Duress is of two kinds: duress of imprisonment, where a man actually loses his liberty; and duress *per minas*, where the hardship is only threatened and impending; but either kind of duress, while it does not render the contract absolutely void, will yet enable the party so under duress to avoid it at his option, while the party practicing the duress can take no advantage of it. It appears formerly to have been the rule that the imprisonment must have been unlawful, or, if lawful, undue force must have been used, or the party made to endure unnecessary privation, to avoid which and to obtain his liberty he made the contract, while the mere fact of imprisonment was not deemed sufficient to avoid an agreement obtained through the medium thereof, if the party was in proper custody under the regular process of a court of competent jurisdiction. Again, the earlier cases made some fine and subtle distinctions in regard to the character of the threats which procured the execution of the contract; but as civilization has advanced the law has tended much more strongly than it formerly did to overthrow everything which is built on violence or fraud, and now, as a rule, all contracts procured by threats or imprisonment and the fear of injury to life, limb or property may be avoided on the ground of duress, whether on

[1] White v. Brocaw, 14 Ohio St. 339; Bush v. Rogan, 65 Ga. 320; Finley v. Walton v. Trusten, 49 Miss. 569; McConnell, 60 Ill. 259. McMaster v. Campbell, 41 Mich. 513;

the part of the person to whom the promise or obligation is made, or on that of his agent.[1] The reason of this is obvious; for in such case there is nothing but the form of a contract without the substance, and, wanting the voluntary assent of the party to be bound by it, the law will refuse to uphold it.[2]

The plea of duress has ever been considered strictly personal, and one man cannot avoid his contract by reason of duress to another;[3] yet to this rule there is a well-settled exception in the case of husband and wife, all the authorities agreeing that either may avoid a contract made to relieve the other from duress;[4] and although it has been questioned, it seems that the relation of parent and child is also to be classed within the same exception.[5] The exception in favor of husband and wife, though founded in some measure on the fiction of legal unity, is raised mainly upon the nearness and tenderness of the relation, and the substantial reasons of the excep-

[1] Watkins v. Baird, 6 Mass. 506; Richardson v. Duncan, 3 N. H. 508; Whitefield v. Longfellow, 13 Me. 146; Baker v. Morton, 12 Wall. (U. S.) 150; Bogle v. Hammons, 2 Heisk. (Tenn.) 136; Helm v. Helm, 11 Kan. 19; Tapley v. Tapley, 10 Minn. 458; Mann v. Lewis, 3 W. Va. 223. In Bush v. Brown, 49 Ind. 573, the following rules relative to duress by imprisonment are deduced from the authorities: (1) Where there is an arrest for improper purposes, upon valid authority; (2) where there is an arrest for a just cause, but without authority; or (3) where there is an arrest for a just cause and under lawful authority for an improper purpose, and the party executes an instrument or pays money to free himself from the arrest, he may avoid the instrument or recover back the money paid. See Severance v. Kimball, 8 N. H. 386; Fisher v. Shattuck, 17 Pick. (Mass.) 252; Brooks v. Berryhill, 20 Ind. 97. But if a person under legal arrest make an agreement to pay a debt he cannot avoid it on the ground of duress. Meek v. Atkinson, 1 Bailey (S. C.), 84; Bowker v. Lowell, 49 Me. 429. If a party execute an instrument from a well-grounded fear of illegal imprisonment, he may avoid it on the ground of duress. Alexander v. Pierce, 10 N. H. 494; Worcester v. Eaton, 13 Mass. 371; Eddy v. Herrin, 17 Me. 338; Bennett v. Ford, 47 Ind. 264; Foshay v. Fergusen, 5 Hill (N. Y.), 154.

[2] United States v. Huckabee, 16 Wall. (U. S.) 432; Foshay v. Fergusen, 5 Hill (N. Y.), 154; Waller v. Parker, 5 Coldw. (Tenn.) 476.

[3] Robinson v. Gould, 11 Cush. (Mass.) 57; Plummer v. People, 16 Ill. 358; Spaulding v. Crawford, 27 Tex. 155; Thompson v. Lockwood, 15 Johns. (N. Y.) 256.

[4] Brooks v. Berryhill, 20 Ind. 97; Greene v. Scrange, 19 Iowa, 461; Eadie v. Slimmon, 26 N. Y. 9.

[5] Southern Ex. Co. v. Duffey, 48 Ga. 358; Osborn v. Robins, 36 N. Y. 365; Plummer v. People, 16 Ill. 358.

tion would, in this view, apply as strongly to the case of parent and child.

Duress of property may also serve as a ground for rescission; and where a party has possession and control of the property of another and refuses to surrender it to the control and use of the owner except upon compliance with an unlawful demand, a contract or conveyance made under such circumstances to emancipate the property is to be regarded as made under compulsion and duress.[1] The decisions upon this point are not uniform in their expression of the law, but they all rest upon the proposition that contracts made under duress of goods are involuntary. What shall constitute duress of goods, as a question of fact, is often difficult to determine.

§ 22. Undue influence. Solicitation, importunity, argument and persuasion to induce a party to enter into a contract or execute a conveyance, will not of themselves affect its validity;[2] nor will influence properly gained, although used for a selfish purpose, or even to obtain an unjust advantage, be sufficient to avoid a deed thereby obtained,[3] provided there has been no fraud or duress, unless the influence has been exercised by a stronger mind over a weak one to such a degree as to substitute the will of the person exerting the influence for that of him upon whom it is exerted, so that the latter is no longer a free agent.[4] But where relations of confidence subsist between the parties,[5] and the contract or deed is the result of an improper exercise of such relations, involving fraud or imposition, a court of equity will, upon proper and seasonable application of the injured party, his representatives or heirs, interfere to avoid the contract or set the conveyance aside.[6]

[1] Adams v. Schiffer, 11 Colo. 15.

[2] Rogers v. Higgins, 57 Ill. 244.

[3] Howe v. Howe, 99 Mass. 88; Holocher v. Holocher, 62 Mo. 267.

[4] Howe v. Howe, 99 Mass. 88; Dean v. Negley, 41 Pa. St. 312.

[5] The relation may be of any kind implying confidence, as trustee and beneficiary, attorney and client, parent and child, guardian and ward, physician and patient, nurse and invalid, confidential friend or adviser. Bayliss v. Williams, 6 Coldw. (Tenn.) 440. And it has been held that, in all cases of fiduciary relations, equity will presume confidence placed and influence exerted.

[6] Allore v. Jewell, 94 U. S. 506; Case v. Case, 26 Mich. 484; Bayliss v. Williams, 6 Coldw. (Tenn.) 440; Turner v. Turner, 44 Mo. 535; Cook v. Berlin, etc. Co. 43 Wis. 433; Rochester v. Levering, 104 Ind. 562; Young v. Hughes, 32 N. J. Eq. 372. A conveyance obtained by children from a father will not be sanctioned

It has been held that express proof of such improper influence need not be shown in such cases, but will be implied from the known relation of the parties;[1] but this, it is believed, is not a correct statement of the law, and the better rule would seem to be that, in order to avoid a contract or grant on the ground of undue influence, it must affirmatively appear that the influence existed and was exercised for an improper purpose.[2]

Where a person from infirmity or mental weakness is likely to be easily influenced by others, the rule is more rigidly applied; and a contract or conveyance entered into by such person, without independent advice, will always be set aside if there is any unfairness in it.[3] Yet, as before remarked, all influences are not unlawful. Persuasion, appeals to the affections, claims of the ties of kindred, references to a sentiment of gratitude for past services or pity for future destitution, or the like, are all legitimate, and may be fairly pressed upon a vendor.[4] On the other hand, pressure of whatever character, whether acting on the fears or the hopes, if so exerted as to overpower the volition without convincing the judgment, is a species of restraint under which no valid disposition can be made. Importunity or threats, such as the vendor has not the courage to resist, moral command asserted and yielded to for the sake of peace and quiet, or of escaping from distress of mind or social discomfort, if carried to a degree in which the free play of the vendor's judgment, discretion or wishes is overborne, will constitute undue influence, though no force is either used or threatened.

The rule is frequently invoked in case of gifts or conveyances without a valuable consideration; and in such cases, where a confidential relation is shown, the burden of proof to

by a court of equity, if it appear to have been caused by an abuse of confidence reposed by him in his children, who, for the purpose of procuring it, took advantage of his age, imbecility and partiality for them; the conveyance being also for an inadequate consideration. Whelan v. Whelan, 3 Cow. (N. Y.) 537.

[1] Bayliss v. Williams, 6 Coldw. (Tenn.) 440. And see Woodbury v. Woodbury, 141 Mass. 329; Tyler v. Gardiner, 35 N. Y. 559.

[2] Turner v. Turner, 44 Mo. 535.

[3] Allore v. Jewell, 94 U. S. 506; Mead v. Coombs, 26 N. J. Eq. 173.

[4] Shailer v. Bumstead, 99 Mass. 112; Potts v. House, 6 Ga. 324; Tyler v. Gardiner, 35 N. Y. 558; Rankin v. Rankin, 61 Mo. 295; Main v. Ryder, 84 Pa. St. 217.

sustain the transaction is usually thrown upon the donee or person who claims the benefit of the conveyance.[1] Undue influence will, in such cases, frequently be inferred from the circumstances;[2] the condition of the donor's health and mind, his dependence on the donee, and the opportunity which the latter may have had to exercise his influence.[3] The fact of influence by the donee over the donor having been established, it is not necessary to show by absolute evidence that this was exercised by the donee at the time of making the gift. Undue influence must be exercised in relation to the gift made, and not as to other transactions, in order to invalidate a gift thus obtained. But if it appears that at or about the time when the gift was made the alleged donor was in other important particulars under the influence of the person receiving the gift — that, as to them, he was not a free agent, but was acting under undue influence — the circumstances may be such as to fairly warrant the conclusion, from the absence of any evidence bearing directly upon acts done when the alleged gift was actually made, that in relation to that also the same undue influence was exerted.[4]

§ 23. **Unforeseen events.** Courts of common law cannot supply defects of will or rectify mistakes in written agreements or conveyances. Hence, with respect to matters of this kind, results the necessity of a court of equity, or a tribunal invested with equitable powers, which, authorized by the principles of justice, ventures to correct words by circumstances and to supply omissions at will by conjecturing what would have been the will of the parties had they foreseen the event.[5] This doctrine, it is said, proceeds upon the theory that every man who makes a covenant or executes a deed has an object in view which he proposes to accomplish by means of the covenant or deed. They sometimes fall short of the end or object which was intended and sometimes go beyond it. If

[1] Garvin v. Williams, 44 Mo. 465; Todd v. Grove, 33 Md. 188.

[2] Drake's Appeal, 45 Conn. 9.

[3] Howe v. Howe, 99 Mass. 88; Boyd v. Boyd, 66 Pa. St. 283; Tyler v. Gardiner, 35 N. Y. 559; St. Leger's Appeal, 31 Conn. 434.

[4] Woodbury v. Woodbury, 141 Mass. 329.

[5] Quick v. Stuyvesant, 2 Paige (N. Y.), 84; Rider v. Powell, 28 N. Y. 313; Greer v. Caldwell, 14 Ga. 207; Miles v. Stevens, 3 Pa. St. 21.

the end proposed is lawful a court of law only inquires what acts of will were really exerted, and the deed or covenant is made effectual without regard to consequences. But courts of equity are more at liberty to follow the dictates of refined justice. They consider every deed in its true light, as a means employed to bring about or accomplish a certain end; and in this light they refuse to give it force any further than is conducive to the proposed end. In all matters the end is the capital circumstance, and the means are regarded only so far as they contribute to that end.[1] Hence, where a deed or obligation is sought to be made effectual in an event which is unexpected to both parties, a court of equity denies its authority. The party who is seeking to enforce it is unjust and inequitable in his demand, and this furnishes a valid objection for the adverse party. If the original intention would, by giving effect to such deed, be defeated, equity may interfere to undo the effect of such deed and restore the parties to their original position, or it may direct that to be done which it is reasonable to suppose the parties would themselves have directed had they foreseen the event.[2]

§ 24. Gifts and donations. The principles of the paragraph devoted to a discussion of undue influence are well illustrated in the case of gifts or conveyances based upon a nominal consideration only between parties who stand in such a relation of confidence to each other as to make it the duty of the person benefited by the contract or bounty to guard and protect the interests of the other, and to give such advice as would promote those interests. Relief in equity will always be afforded against such transactions whenever it is made to appear that there has been an abuse of confidence or acquired influence. The relief is not confined to cases where there is a legal control, such as that which parents and guardians have over minors, or husbands over wives; for courts of equity, with

[1] Quick v. Stuyvesant, 2 Paige (N. Y.), 84.

[2] Miles v. Stevens, 3 Pa. St. 21; Greer v. Caldwell, 14 Ga. 207; Quick v. Stuyvesant, 2 Paige (N. Y.), 84. As where one person conveyed land to another for the purpose of opening a street in the city of New York, and there was no other consideration for the conveyance but the benefit which the grantor was to derive from the opening of the street, and by subsequent events, beyond the control of both parties, the street could not be opened, a reconveyance of the land was decreed. Ib.

a broader view of human passions, emotions and frailties, recognize the influences as passing beyond the fixed limits of majority, and independent of legal incapacities.[1] Nor indeed can the cases for the application of the doctrine be scheduled, for it stands upon a general principle which reaches every variety of relations in which domination may be exercised by one person over another.

These principles are of general if not uniform recognition throughout the Union; and although the reported cases do not go to the extent of rendering void all gifts or bounties toward those having this influence, they do fully reach the position that they will be avoided in every case where they are of such a nature as a judicious friend, regarding the interests of the donor, would not have advised, and should have declined.

The burden of proof is, in general, upon the party charging the fraud, coercion or undue influence; but where undue influence is once proven to exist, by whatsoever means produced or acquired; whenever the mind of one person is reduced to a state of vassalage to that of another, and a gift is shown to have been made by the weaker party to the stronger, there the burden of proof will be shifted: the gift will be presumptively void, and the *onus* of upholding its fairness and validity will rest upon the shoulders of the recipient of the gift.[2] This rule is firmly established in regard to gifts made by deed, and the same principle holds equally in regard to wills.

§ **25. Mental weakness.** It is a settled principle of law that the execution of a contract should be the intelligent act of the parties to it, made upon a full comprehension of its character and import. If, therefore, the minds of either of the parties are in such a condition as to render them incapable of understanding the contract or of acting intelligently in regard thereto, equity will refuse to sanction the same, and will restore the parties to their original position.[3] Yet mere mental

[1] Gillispie v. Holland, 40 Ark. 28.

[2] Harvey v. Sullens, 46 Mo. 147.

[3] Harding v. Handy, 11 Wheat. (U. S.) 103; Seely v. Price, 14 Mich. 541; Highberger v. Siffer, 21 Md. 354; Simonton v. Bacon, 49 Miss. 582; Cadwallader v. West, 48 Mo. 483; Henderson v. McGregor, 30 Wis. 80; Scanlan v. Cobb, 85 Ill. 297.

weakness, not amounting to idiocy or lunacy, will not in itself be sufficient to avoid a contract, provided such weakness does not amount to inability to comprehend it;[1] for absolute soundness of mind is by no means essential to the execution or enforcement of agreements, and unless there is gross inadequacy of consideration, or some other evidence of fraud, imposition or overreaching, any degree of imbecility short of total business incapacity will be insufficient to authorize a rescission.[2] Old age, unless combined with such a degree of mental weakness as to render the party incapable of protecting his own interests, furnishes no ground for invalidating a contract,[3] where the parties stand in no relation of confidence or trust, and there is no evidence of imposition or undue influence.[4] Hallucinations or delirium produced by disease do not necessarily avoid a contract if the capacity remains to see things in their true relations and to form correct conclusions;[5] nor will temporary insanity arising from intemperance or like causes be sufficient, unless it can be shown to have existed at the time.[6] Partial insanity, or monomania, unless it exists with reference to the subject of the contract, is not regarded as grounds for avoidance; for it is well known that many persons so afflicted retain the capacity to transact business with ordinary sagacity.[7]

But where there is accompanying evidence of fraud, advan-

[1] Jackson v. King, 4 Cow. (N. Y.) 207; Dennett v. Dennett, 44 N. H. 531; Darnell v. Rowland, 30 Ind. 342; Beller v. Jones, 22 Ark. 92; Miller v. Craig, 36 Ill. 109; Sheldon v. Harding, 44 Ill. 74; Lindsey v. Lindsey, 50 Ill. 79; Hovey v. Hobson, 55 Me. 256; Killian v. Badgett, 27 Ark. 166; Mann v. Batterly, 21 Vt. 326; Henderson v. McGregor, 30 Wis. 78; Aiman v. Stout, 42 Pa. St. 114.

[2] Petrie v. Shoemaker, 24 Wend. (N. Y.) 85; Henry v. Ritenour, 31 Ind. 136; Henderson v. McGregor, 30 Wis. 78; Mann v. Batterly, 21 Vt. 326; Beller v. Jones, 22 Ark. 92; Rogers v. Higgins, 57 Ill. 244.

[3] Wiley v. Ewalt, 66 Ill. 26; Clearwater v. Kimler, 43 Ill. 272. Where mental weakness has been gradual and continuous, and is the direct result of old age, proof of that fact is admissible in a suit to set aside deeds made by one who has been adjudged mentally unsound, though the deeds were executed prior to the filing of the petition for inquest; and the records of the inquest and adjudication of insanity are also admissible as the basis of inquiry into the prior mental condition. Giles v. Hodge (Wis.), 43 N. W. Rep. 163.

[4] Wiley v. Ewalt, 66 Ill. 26.

[5] Staples v. Wellington, 58 Me. 453.

[6] Lewis v. Baird, 3 McLean (C. Ct.), 56.

[7] Galpin v. Wilson, 40 Iowa, 90.

tage or deceit, the imbecility or weakness of mind [1] of the person defrauded will usually become a controlling circumstance,[2] while in many instances the very fact of extreme weakness will raise an almost necessary presumption of imposition, even when it stops short of legal incapacity.[3] All contracts made by persons so situated are critically scrutinized in a court of equity, and relief granted upon reasonable application — this being among its best-settled principles.[4] Though such a contract in the ordinary course of things might be permitted to stand, yet if it should appear to be of such a nature as that the person executing the same could not be capable of measuring its extent or importance, its reasonableness or value, fully and fairly; or if it further appears that the other party has obtained a commanding influence over or the entire confidence of the injured party, which was used; or if any other evidence of unwarranted means be shown, the weakness of mind, together with the other circumstances, make up that amount of fraud and imposition which justifies a court of equity in avoiding the contract.[5]

It is immaterial, so far as the application of the foregoing principles are concerned, whether the contract has been executed or still remains executory. If the infirm party retains sufficient ability to comprehend the meaning, design and effect of his acts, he will be bound by them in the absence of other circumstances; if, on the contrary, there exists in him such a condition of the mental faculties as to render him wholly incapable of acting rationally in the ordinary affairs of life, equity will usually interfere to set aside his conveyances upon the ground of fraud, it being presumed that by reason of his condition he has been overreached. Yet in so doing due regard must be had for the rights of the sane party. If indeed

[1] The advanced age of a grantor and his great grief and sickness induced by the death of his wife are proper circumstances to be considered in determining whether he had the requisite mental capacity to execute the deed, or whether he was the victim of an undue influence or any other matter of overreaching. Willemin v. Dunn, 93 Ill. 511.

[2] Darnell v. Rowland, 30 Ind. 342; Seely v. Price, 14 Mich. 541; Allore v. Jewell, 94 U. S. 506; Tracey v. Sacket, 1 Ohio St. 54.

[3] Harding v. Handy, 11 Wheat. (U. S.) 103.

[4] Allore v. Jewell, 94 U. S. 506.

[5] Allore v. Jewell, 94 U. S. 506; Harding v. Handy, 11 Wheat. (U. S.) 103.

he has by art or cunning imposed upon the insane person, knowing him to be such, clearly he has no standing in a court of conscience, and should not be heard to complain or ask for redress of injuries occasioned solely by his own wrong. But, if, on the contrary, such purchase has been made and conveyance obtained in good faith, for a sufficient consideration, and with no knowledge of the other party's infirmity, such conveyance should not be set aside unless there can be a complete restoration of all parties to their original condition. Natural justice, no less than reason and precedent, demand such a course; and such are the enlightened views now entertained by a majority of the courts of this country.[1] Again, it may happen that the evidence, though insufficient to justify a decree declaring the deed void, may yet disclose that it was obtained under such circumstances as to render it at least unfair and unreasonable for the sane party to retain the full advantage of his bargain; and in such cases where he is the vendee, the court may direct that the deed shall stand only as security for the indemnity of such party in respect of the sum actually advanced.[2]

It is further to be observed that in all cases the unsoundness of mind requisite to vitiate a contract or afford ground for rescission must exist at the time the contract is entered into;[3] and when the insanity alone is relied upon the contract must be shown to be a direct result of the mental disease.[4]

§ **26. Infancy.** It has always been one of the cherished principles of the law to permit one who has sold or purchased property during infancy to rescind, or rather to disaffirm, the contract on attaining majority. This has been allowed to him

[1] Young v. Stevens, 48 N. H. 133; Fay v. Burditt, 81 Ind. 441; Eaton v. Eaton, 37 N. J. L. 117; Bank v. Moore, 78 Pa. St. 414; Scanlan v. Cobb, 85 Ill. 297; Fitzgerald v. Reed, 9 S. & M. (Miss.) 94; Carr v. Halliday, 5 Ired. Eq. (N. C.) 167; Mohr v. Tulip, 40 Wis. 66. The only American cases militating against this doctrine are Gibson v. Soper, 6 Gray (Mass.), 281, and Crawford v. Scovel, 94 Pa. St. 48; but in the latter case it would seem that the sane party knew of the other's insanity, and later cases in Pennsylvania sustain the doctrine of the text.

[2] Dunn v. Chambers, 4 Barb. (N. Y.) 376.

[3] Crouse v. Holman, 19 Ind. 39; Staples v. Wellington, 58 Me. 453; Stewart v. Redditt, 3 Md. 81.

[4] Blakeley v. Blakeley, 33 N. J. Eq. 502; Wray v. Wray, 32 Ind. 126.

as a means whereby he may be discharged from obligations which he deems prejudicial, and has received the full sanction of every court in the Union.

Whether the contract be executory or executed makes but little difference so far as the rights of the infant are concerned. The privilege of rescission is undoubted in either case. With regard to the rights of the other contracting party the authorities are not harmonious. It is stated by Kent,[1] and announced as a controlling doctrine in many — perhaps a majority — of the states, that where a party under the plea of infancy seeks to avoid an executed contract, he must restore the consideration which he has received.[2] The rule, though broad, is nevertheless one which commends itself to most men as being founded in strict and impartial justice. Its tendency is to enforce honesty in transactions between individuals, and is fully in consonance with the oft-quoted principle that the privilege of infancy is to be used as a shield and not as a sword; or, in other words, that infancy may and should be protected, but should not be permitted to oppress or injure others.

There are cases which apparently militate against this rule,[3] but they are in conflict with the weight of authority, and do not represent the now generally received opinions of the courts of the country. There is also a class of cases which, while giving a general assent to the doctrine just stated, subjects it to an important qualification. These authorities observe a distinction between the case of an infant in possession of the property or consideration after coming of age, and where he has lost, sold or destroyed the same during his minority. If the infant, after he arrives of age, is shown to be possessed of the consideration paid him, whether it be property, money or choses in action, and either disposes of it so that he cannot restore it, or retains it for an unreasonable length of time, he is considered as having ratified the contract, which is rendered obligatory

[1] 2 Kent's Com. 241.

[2] Bartholomew v. Finnemore, 17 Barb. (N. Y.) 428; Bartlett v. Cowles, 15 Gray (Mass.), 445; Cummings v. Powell, 8 Tex. 80; Bailey v. Barnberger, 11 B. Mon. (Ky.) 113; Carr v. Clough, 26 N. H. 280; Taft Co. v. Pike, 14 Vt. 405; Boody v. McKinney, 23 Me. 525; Cogley v. Cushman, 16 Minn. 397.

[3] See Miles v. Lingerman, 24 Ind. 385; Cressinger v. Welch, 15 Ohio, 156.

upon him; if the consideration still remains in his possession or under his control, he must restore or offer to restore as the condition of rescission, but if he has spent or wasted the same during his minority the obligation ceases.[1] It is to be observed, however, that this rule, in most of the cases where it has been applied, is a rule of law and not of equity. The actions in a majority of the cases cited in support of the rule were brought for a recovery of the consideration, the infant having previously elected to disaffirm; and the courts, in several instances, while laying down the rule, intimate that if the infant sought a rescission in a court of equity, he would be required to refund the consideration whether he had disposed of it or not before he arrived at lawful age.[2]

A disaffirmance may be accomplished by some express act, or by acts which imply a disaffirmance; but in either case, before the contract will be considered as rescinded, the intention to disavow must be unequivocally demonstrated.[3] A deed by a minor executed after arriving of age, conveying lands which during infancy he had conveyed to another, would meet the requirements of the rule, provided it was of as high a character as that first given, and on its face appeared to undo that which had been done by the former deed;[4] but it is well established, both on principle and authority, that such second deed must be so inconsistent with the first that both cannot stand, in order, of itself, to work a disaffirmance.[5]

A minor has no power to disaffirm or avoid his conveyance before attaining his majority; but with respect to the time within which he must disaffirm after minority ceases, or be barred, the authorities are not agreed. Reasoning by analogy it would seem that he should exercise his privilege within a reasonable time after the right accrues; yet of the decided

[1] Manning v. Johnson, 26 Ala. 446; Miles v. Lingerman, 24 Ind. 385; Price v. Furman, 27 Vt. 271; Chandler v. Simmons, 97 Mass. 508; Robbins v. Eaton, 10 N. H. 562; Boody v. McKinney, 23 Me. 517.

[2] See Manning v. Johnson, 26 Ala. 446.

[3] Buchanan v. Griggs, 18 Neb. 121.

[4] Jackson v. Burchin, 14 Johns. (N. Y.) 124; Bool v. Mix, 17 Wend. (N. Y.) 132; Tucker v. Moreland, 10 Pet. (U. S.) 58; Patterson v. Laik, 25 Mo. 544; Cressinger v. Welch, 15 Ohio, 156.

[5] McGan v. Marshall, 7 Humph. (Tenn.) 121; Leitensdorfer v. Hempsted, 18 Mo. 269; Eagle F. Co. v. Lent, 6 Paige (N. Y.), 635.

cases a majority are to the effect that he need not, and that he is not barred by mere acquiescence for a shorter period than that prescribed by the statute of limitations.[1] The lapse of a less period of time, taken in connection with other circumstances, may amount to a confirmation;[2] but where there are no circumstances other than lapse of time and silence, any period less than the period of limitation will not be a bar.[3]

The English cases announce a different rule; and a large and well-considered class of American cases also supports the doctrine that mere acquiescence beyond a reasonable time after minority ceases bars the right to disaffirm.[4] It is well contended in support of this doctrine that the rule holding certain contracts of an infant voidable (among them his conveyances of real estate), and giving him the right to affirm or disaffirm after he arrives at majority, is for the protection of minors, and so that they shall not be prejudiced by acts done or obligations incurred at a time when they are not capable of determining what is best for their interest to do. For this purpose of protection the law gives them an opportunity, after they have become capable of judging for themselves, to determine whether such acts or obligations are beneficial or prejudicial to them, and whether they will abide by or avoid them. If the right to affirm or disaffirm extends beyond an adequate opportunity to so determine and to act on the result, it ceases to be a measure of protection, and becomes a dangerous weapon of offense and not of defense.[5] Again, as is well observed by Gilfillan, J.,[6] "the existence of such an infirmity in one's title as the right of another at his pleasure to defeat it is necessarily prejudicial to it, and the longer it may continue the

[1] Vaughan v. Parr, 20 Ark. 600; Davis v. Dudley, 70 Me. 236; Norcum v. Gaty, 19 Mo. 69; Prout v. Wiley, 28 Mich. 164; Hale v. Gerrish, 8 N. H. 374; McMurry v. McMurry, 66 N. Y. 175; Cressinger v. Lessee of Welch, 15 Ohio, 156; Irvine v. Irvine, 9 Wall. (U. S.) 627.

[2] Cressinger v. Lessee of Welch, 15 Ohio, 156; Wheaton v. East, 5 Yerg. (Tenn.) 41; Morris v. Stewart, 14 Ind. 334.

[3] Tucker v. Moreland, 10 Pet. (U. S.) 76.

[4] Kline v. Beebe, 6 Conn. 494; Scott v. Buchannan, 11 Humph. (Tenn.) 468; Hastings v. Dollarhide, 24 Cal. 195; Hartman v. Kendall, 4 Ind. 403; Bigelow v. Kenney, 3 Vt. 353; Harris v. Cannon, 6 Ga. 382.

[5] Goodnow v. Empire Lumber Co. 31 Minn. 468; Wallace's Lessee v. Lewis, 4 Harr. (N. J.) 80.

[6] Goodnow v. Empire Lumber Co. 31 Minn. 468.

more serious the injury. Such a right is a continued menace to the title. Holding such a menace over the title is of course an injury to the owner of it. One possessing such a right is bound, in justice and fairness towards the owner of the title, to determine without delay whether he will exercise it." Indeed, there can be no serious dispute in respect to the principle that the right of a minor to disaffirm on coming of age, like the right to disaffirm in any other case, should be exercised with some regard to the rights of others; and as in every other case of a right to disaffirm the party holding it is required, out of regard to the rights of those who may be affected by its exercise, to act upon it within a reasonable time, so there is no reason for allowing greater latitudes where the right exists because of infancy at the time of making the contract.[1]

§ 27. **Illegality.** As it is the settled doctrine of courts never to extend their aid for the enforcement of executory contracts based upon a consideration contrary to law, immoral, or opposed to public policy, so also, where the contract has been fully and voluntarily executed, if the parties are *in pari delicto*, will they refuse to interfere for the purpose of disturbing the acquired rights of either at the instance of the other. So far as the parties are concerned in their legal relations to each other, the result is the same as if the contract had originally been legal and valid, and neither can move to rescind or recover the consideration which he has thus voluntarily parted with.[2] In all such cases it is the policy of the law to leave the parties where it finds them.[3] Thus, if the contract has been executed with a view to defraud or hinder creditors, the conveyance will be valid between the parties and their privies; while an executory contract, having in view the same object, will be incapable of enforcement either at law or in equity, and the fraud may be set up by either party as an absolute defense.[4]

[1] In the case of Goodnow v. Empire Lumber Co. 31 Minn. 468, an unexplained delay of three years and a half by a minor unmarried woman to disaffirm her deed after coming of age was held unreasonable.

[2] Hill v. Freeman, 73 Ala. 200; Jacobs v. Stokes, 12 Mich. 381; Liness v. Hesing, 44 Ill. 113; Warrenton v. Eaton, 11 Mass. 368; Marksburg v. Taylor, 10 Bush (Ky.), 519; Gisuf v. Neval, 81 Pa. St. 356; Smith v. Hubbs, 10 Me. 71; Payne v. Burton, 10 Ark. 53.

[3] Myers v. Meinrath, 101 Mass. 367; Black v. Oliver, 1 Ala. 449; Heath v. Van Cott, 9 Wis. 516.

[4] White v. Crew, 16 Ga. 416; Ryan

Rescission, in such latter event, may be had at the mere will of either party, while in the former it is impossible; the non-interference in both cases working practically these results.

§ 28. Rescission after conveyance with covenants. When a contract for the sale of lands is fully executed by a conveyance with a covenant of warranty and the payment of the purchase money, courts are loath to grant a rescission for anything but fraud; and though the title may be defective, and the fact of such defect was concealed from the purchaser at the time of sale, the remedy will still lie in an action on the covenant unless it can be clearly shown that a rescission is necessary to the ends of justice.

If at the time of hearing the vendor is able to remedy the supposed defect in his title, or secures or offers to make good to the vendee, at his own cost, all that he had originally conveyed, the vendee must show some loss, injury or damage by the delay in perfecting title before a rescission can be claimed or granted. And even if this be shown, courts will not, as a general rule, be authorized to decree a rescission if compensation can be made for the injury arising from the delay in making good the original defect in the title.[1]

§ 29. When rescission must be entire. It is a fundamental rule that an entire contract cannot be affirmed in part and disaffirmed as to the residue. The right to rescind, if it exists, can only be exercised by making a complete restoration, leaving the parties as though the contract had never been made; in other words, rescission, if at all, must be *in toto*.[2] Hence, a party cannot rescind while retaining any part of his advantage

v. Ryan, 97 Ill. 38; Willis v. Morris, 63 Tex. 458; Walton v. Tusten, 49 Miss. 569; Ayer v. Duncan, 50 Cal. 325; Welby v. Armstrong, 21 Ind. 481.

[1] Seymour v. Delancy, 3 Cow. (N. Y.) 445; Hepburn v. Dunlap, 1 Wheat. (U. S.) 179; Kimball v. West, 15 Wall. (U. S.) 377. In this case the vendor represented that the title to his land was good and unincumbered, when in fact an action of ejectment was then pending for one hundred and four acres of it, in which judgment was afterwards rendered against him. But before the cause came to hearing the vendor purchased the outstanding and conflicting title and tendered to the vendee such conveyances as made his title perfect. The circuit court therefore dismissed the vendee's bill, and the appellate court affirmed the decision.

[2] Miner v. Bradley, 22 Pick. (Mass.) 457; Filby v. Miller, 25 Pa. 264; Potter v. Titcomb, 22 Me. 300; Buchanan v. Horney, 12 Ill. 338; Wolf v. Dietzsch, 75 Ill. 205.

under the contract; thus, he cannot avoid the sale and at the same time retain the consideration he has received.[1] He must put the other party in as good condition as before the sale, by a return of the specific thing received;[2] and this ability to restore the identical matter purchased is usually indispensable to the exercise of the right to rescind.[3]

§ 30. When rescission may be partial. While it is a general rule that a rescission, to be effective, must contemplate a complete restoration of the parties to their original positions, and that a contract cannot be affirmed in one part and disaffirmed in another part, yet where the contract is divisible into several independent parts resting on different considerations, a party entitled to avail himself of a rescission may, it seems, retain the subject of one part and at the same time maintain a suit in equity to rescind the other part on equitable terms, or, by tendering back the consideration or benefit received under that part, treat it as rescinded at law.[4] Again, circumstances may arise which call for a modification of the rule so far as to permit a partial rescission. Thus, where a party, by false and fraudulent representations as to the character and quality of his land, induces another to exchange other land for it, and then conveys a portion of the land thus obtained to an innocent purchaser, so that it is out of his power to reconvey it, and thus wholly rescind the contract, it is competent for a court of equity to decree a partial rescission, and to grant to the injured party such relief, by way of compensation, as may be necessary to repair the damage he may have sustained.[5]

§ 31. As affected by limitation. The right of rescission, to be effectual, must be exercised in apt time; and when through apathy or neglect a party fails to assert his rights or to avail himself of the remedies which the law affords for a violation of

[1] McCrillis v. Carlton, 37 Vt. 139; Dellone v. Hull, 47 Mo. 112; Bishop v. Stewart, 13 Nev. 25; Hendricks v. Goodrich, 15 Wis. 679.

[2] Smith v. Brittenham, 98 Ill. 188.

[3] Morse v. Brackett, 98 Mass. 209; Hammond v. Buckmaster, 22 Vt. 375; Shepard v. Temple, 3 N. H. 455.

[4] Higham v. Harris, 8 N. E. Rep. 255.

[5] Hopkins v. Sneadaker, 71 Ill. 449. In this case the court required the party in fault to pay to the other, in money, the price at which the land taken by him was estimated in the exchange, and take a reconveyance of the same, while the amount of money so decreed to be paid was made a lien on that portion of the land conveyed to the defrauding party which he then continued to hold.

the same for such period as the law has established as a limitation of actions therefor, he must suffer whatever damage he may have sustained thereby, and is without a legal remedy. Particularly is this true where the cause of action or ground for relief is occasioned by the fraud of the other party; and if at the time of the discovery of a fraud the party injured has a legal capacity to act and to contract, his right of action accrues, and the statute of limitations begins to run against it. This rule seems to be imperative, and is applied in all cases irrespective of the degree of intelligence possessed by the injured party, or of his freedom from undue influence or his ability to resist it. It may be that such party may not realize as clearly and distinctly as others the force of the facts brought to his knowledge, or the extent and scope of the wrong which has been done him, yet if he has memory, sense and judgment, a mental capacity of low grade and a lack of independence and courage will not excuse his failure to act where he yet has sufficient ability to understand and comprehend.[1]

§ 32. **Duty of rescinding party.** A party who asks for the rescission of a contract must be himself without fault, for no one will be permitted to take advantage of his own wrong to put an end to an agreement into which he has entered. Nor can he consider the other party in fault, and thus have reason for rescission, until he has performed or offered to perform all of the conditions he has agreed to.[2] And he must not only show himself ready and willing to comply with all the conditions of his agreement, but he must have the ability so to do.[3] He must, if the vendor, and seeking rescission on the ground of non-performance, not only prepare and tender a deed,[4] or at

[1] Accordingly *held*, where the owner of real estate was induced to convey the same by fraudulent representations and undue influence on the part of the grantee, and after discovery of the fraud commenced an action against the grantee to set aside the conveyance because thereof, but was induced by further fraudulent representations and undue influence to discontinue the same, that another action to set aside said conveyance, commenced more than ten years after the discovery of the original fraud, was barred by the statute. Piper v. Hoard, 107 N. Y. 67.

[2] See § 13, "Laches and delay."

[3] Laird v. Smith, 44 N. Y. 618; Swan v. Drury, 22 Pick. (Mass.) 485; Winslow v. Copeland, 15 Me. 276; Irwin v. Bleakly, 67 Pa. St. 24.

[4] Sanford v. Emory's Adm'r, 34 Ill. 468.

least offer so to do, but in addition be in possession of the title to make the deed effective;[1] and unless such conditions exist his tender will be of no avail. So, too, if he desires to rescind for other causes he must keep himself in position to place the purchaser in the same state in which he was before the sale;[2] for it is a fundamental rule that when a contract is rescinded by the act of one party, or by the decree of a court of competent jurisdiction, the other party must be remitted to the condition he was in when the contract was made; or, in other words, as a condition of rescission, the rescinding party must first place the other *in statu quo*.[3] Hence, if the vendor seeks to rescind he must be prepared to restore to the purchaser whatever money he may have paid in pursuance of the contract,[4] as well as to reimburse him for his improvements, if any have been made.[5]

An exception to the foregoing rule has been made, or attempted, by the courts of some of the states, where the rescinding party at the time the contract was entered into was under some disability or incapacity, as infancy or insanity;[6] but unless the incapacity was total, and the contract made under such circumstances as to raise a presumption of fraud on the part of the capable party, the weight of authority does not sustain the exception.[7]

[1] Swan v. Drury, 22 Pick. (Mass.) 485; Mix v. Beach, 46 Ill. 311.

[2] Brown v. Witter, 10 Ohio, 142; Downer v. Smith, 32 Vt. 1; Jennings v. Gage, 13 Ill. 610; Johnson v. Jackson, 27 Miss. 498; Lucy v. Bundy, 9 N. H. 17; Tisdale v. Buckmore, 33 Me. 461.

[3] Lane v. Latimer, 41 Ga. 171; Underwood v. West, 52 Ill. 397; Smith v. Brittenham, 98 Ill. 188; Willoughby v. Moulton, 47 N. H. 205; Young v. Stevens, 48 N. H. 133; Latham v. Hicky, 21 La. Ann. 425; Percival v. Hichborn, 56 Me. 575; Johnson v. Jackson, 27 Miss. 498; Hammond v. Buckmaster, 22 Vt. 375; Teas v. McDonald, 13 Tex. 349; Hyslip v. French, 52 Wis. 513; Farris v. Ware, 60 Me. 482.

[4] Latham v. Hicky, 21 La. Ann. 425; Percival v. Hichborn, 56 Me. 575; Emerson v. McNamara, 41 Me. 565; Cook v. Gilman, 34 N. H. 556; Williams v. Ketchum, 21 Wis. 432; Morrow v. Rees, 69 Pa. St. 68; Gay v. Alter, 102 U. S. 79; Murphy v. Lockwood, 21 Ill. 611; Smith v. Brittenham, 98 Ill. 188.

[5] Williamson v. Moore, 2 Disney (Ohio), 30; Farris v. Ware, 60 Me. 482.

[6] Gibson v. Soper, 6 Gray (Mass.), 279; and see Chandler v. Simmons, 97 Mass. 508; Price v. Furman, 27 Vt. 268; Boody v. McKenny, 23 Me. 517.

[7] In cases of fraud, however, while the general principles stated in the text are all applicable, yet the fact

On the other hand, a purchaser who seeks to rescind a sale of lands on account of fraud, misrepresentation, defect of title, etc., must be diligent to discover the fraud or other matter relied on, and prompt to avail himself of the discovery when made[1] — the equity of a bill to rescind being always weakened by delay in bringing the suit.[2] If he remains in possession and enjoyment of the property with notice of the facts giving him a right to rescind,[3] or if he enters into new stipulations with his vendor,[4] or with full knowledge that he has been defrauded proceeds to execute the contract by payments of the purchase money,[5] his right will be lost; for he thereby ratifies the contract, and having waived the objection he cannot afterwards be heard to take advantage of it.[6] So, too, before a purchaser can rescind or sue for money paid, he must, if in possession, surrender or offer to restore possession of the property purchased.[7]

In every case it is a general rule that the defrauded party to a contract has but one election to rescind, that he must exercise that election with reasonable promptitude after discovery of the fraud, and when he once elects he must abide by

that absolute restitution is impossible will not prevent a rescission. Coffee v. Ruffin, 4 Coldw. (Tenn.) 487; Myrick v. Jack, 33 Ark. 425. But the rescinding party must in all instances do equity and restore as far as restoration is possible. Martin v. Roberts, 5 Cush. (Mass.) 126; Downer v. Smith, 32 Vt. 1.

[1] Rogers v. Higgins, 57 Ill. 244; Elder v. Sabin, 66 Ill. 126; Sieveking v. Litzler, 31 Ind. 13; Davis v. Tarwater, 15 Ark. 286; Foster v. Gressett, 29 Ala. 393; Obert v. Obert, 12 N. J. Eq. 423; Ayres v. Mitchell, 11 Miss. 683; Weeks v. Robie, 42 N. H. 316; Collins v. Townsend, 58 Cal. 608; Schiffer v. Dietz, 83 N. Y. 300.

[2] Foxworth v. Bullock, 44 Miss. 457. The general rule is that the election to rescind must be exercised within a reasonable time. Whitcomb v. Denio, 52 Vt. 382; Bank v. Hiatt, 58 Cal. 234; Morgan v. McKee, 77 Pa. St. 228; Wilbur v. Flood, 16 Mich. 40. But what shall be considered "reasonable time" is largely dependent on circumstances, and is a mixed question of law and fact. Hedges v. R. R. Co. 49 N. Y. 223; Kingly v. Wallis, 14 Me. 57; Rothchild v. Rowe, 44 Vt. 389.

[3] Garret v. Lynch, 45 Ala. 204; Davis v. Stuard, 99 Pa. St. 295.

[4] Dennis v. Jones, 44 N. J. Eq. 513.

[5] Knuckolls v. Lea, 10 Humph. (Tenn.) 577.

[6] Thweatt v. McLeod, 56 Ala. 375; Evans v. Montgomery, 50 Iowa, 235; Bassett v. Brown, 105 Mass. 551; and see Thomas v. Bartow, 48 N. Y. 200; Dimon v. R. R. Co. 5 R. I. 130. But although he may not be permitted to rescind, his right of action for damages will not be impaired.

[7] Martin v. Chambers, 84 Ill. 579.

his decision. Delay in rescission of the contract is evidence of a waiver of the fraud, and an election to treat the contract as valid.[1]

There are also some apparent exceptions to the rules just stated which grow out of the fraud of the parties. Thus, a conveyance may be set aside as to part of the premises which, by fraud and misrepresentation of the grantee, was included therein, although no part of the consideration was paid or received on account thereof, without rescinding the actual sale or setting aside the entire deed; and the grantor in such case is not bound, in order to maintain his suit, to tender back the consideration paid for the land actually sold.[2]

§ 33. **Necessity of notice.** Whenever a specific mode of rescinding is provided by the contract no other method can be adopted, but in the event of silence as to this particular, the party desiring to rescind is ordinarily required to convey some notice of such intention to the other party. This is an invariable rule in all cases where rescission is set up as a defense to an action.[3] There must, in such cases, be some positive act manifesting intention, that the other party may be put upon his guard, and if he so desires, to comply with the contract.[4]

It is not essential, however, that such notice should be in

[1] Dennis v. Jones, 44 N. J. Eq. 513; Williamson v. R. R. Co. 29 N. J. Eq. 311; Baird v. Mayor, 96 N. Y. 567; Farlow v. Ellis, 15 Gray (Mass.), 229; Wilbur v. Flood, 16 Mich. 40; Hoadley v. House, 32 Vt. 179.

[2] Bartlett v. Drake, 100 Mass. 174. In this case there was a sale of only two parcels of land for an agreed price; but the grantee fraudulently substituted a deed including these two parcels and other land belonging to the grantor, and by false representations induced her to sign the deed, upon the belief that it contained only the two parcels which she had agreed to sell. The trial court ruled that the question of misrepresentation and fraudulent substitution was not open, because the grantor had not returned or offered to return the consideration paid and received for the deed; but on appeal it was held that if the grantor could establish the facts that the parcels of land not sold but alleged to have been inserted in the deed by the fraud of the grantee were so included, and that no part of the consideration was paid and received on account thereof, she might set up the fraud and avoid the conveyance of those lands without rescinding the actual sale or setting aside the entire deed — the avoidance applying to the grant of the title and not to the instrument by which it was made.

[3] Carney v. Newberry, 24 Ill. 203; Higby v. Whitaker, 8 Ohio, 201.

[4] Mullin v. Bloomer, 11 Iowa, 360.

writing or accompanied by any formalities, provided the fact of notice is brought home to the other party. It may be by word of mouth, or by any act of either party, that prevents performance of the mutual understanding.[1]

§ 34. Rights of the parties on rescission. As has been shown, it is a fundamental principle in this branch of the law that a rescission contemplates, as far as possible, a complete restoration of the parties to the positions they respectively occupied prior to entering into the engagement. Indeed, this is ordinarily the indispensable condition to the granting of the relief; and the rights of the parties as they existed at the time the contract was made forms the first subject of judicial inquiry after the facts necessary to confer jurisdiction have been established. In furtherance of this doctrine it is a general rule that, where the rescission is had by mutual consent, or by the terms of the contract, or in consequence of the default of the vendor, the vendee is entitled to recover whatever he has paid toward the purchase money, unless there is an agreement connected with the rescission which restricts its operation and effect.[2] To secure the repayment of such money as he may have advanced under the contract, the purchaser has an equitable lien on the land,[3] while the law implies a promise on the part of the vendor to reimburse him for labor and materials expended in making reasonable repairs and improvements on the property.[4] The lien of the vendee is similar in character to that of the vendor for the unpaid purchase money; and though spoken of by Story, as well as other writers, as an implied trust or lien upon the estate itself, the better opinion seems to be that it is a mere equity, created and administered in the same manner as the vendor's lien. This equity is said,

[1] Sauber v. Prellin, 1 S. C. 273; Graham v. Holloway, 44 Ill. 385.

[2] As where parties who had entered into an agreement of sale, under which the purchaser advanced money, subsequently executed an instrument of rescission, by the terms of which each surrendered all his right, title and interest under and by virtue of the agreement, and agreed that the same "shall be canceled and of no effect from this date," *held*, that by such instrument of release the purchaser gave up all right to the money paid, and hence could not maintain an action to recover it back. Tice v. Zinssler, 76 N. Y. 549.

[3] Davis v. Heard, 44 Miss. 50; Taft v. Kessell, 16 Wis. 274; Barbour v. Morris, 6 B. Mon. (Ky.) 120; Herring v. Pollard, 4 Humph. (Tenn.) 362.

[4] Farris v. Ware, 60 Me. 482.

however, to exist and attach itself upon the land as soon as the payments, improvements, etc., are made, and becomes operative against the vendor, as well as all others claiming under him with notice of the the vendee's rights.

The measure of compensation to which a vendee is entitled upon rescission, on account of the vendor's default, would seem to be the purchase money paid, the value of permanent improvements or repairs, if made in good faith, and the amounts paid for taxes, together with interest on all said several sums, but deducting from the aggregate the value of the rent while the vendee remained in possession.[1] It has been held, in some instances, that where there has been no fraud or manifest injustice in the conduct of either party, and the one has enjoyed the use of the land, and the other has had the use of its accepted equivalent, upon decreeing a rescission the land should be restored to the vendor without any account for profits, and the price should be refunded to the vendee without interest; or, in other words, that the use of the land should be allowed to balance the interest on the purchase money.[2] But even in such cases, if the vendee has made valuable and permanent improvements, or, on the contrary, has committed waste, there should be an account for waste, if any, and for improvements, if any.[3] There is nothing arbitrary about this rule, however, and a reasonable discretion should be exercised in its application in view of all the circumstances attending each particular case, the fundamental idea being to place the parties as far as possible *in statu quo*. Thus, where part of the purchase money remains unpaid, the purchaser, if in possession, should account for the same proportion of the total value of the rents that the unpaid part bears to the whole consideration; or, if the land be wild or unproductive, so that the rents could not be as beneficial as the use of the price paid, the vendee should be reimbursed by the payment of interest.

[1] Bryant v. Boothe, 30 Ala. 311; Patrick v. Roach, 21 Tex. 251; Coffman v. Huck, 19 Mo. 435; Outlaw v. Morris, 7 Humph. (Tenn.) 262; Patrick v. Roach, 21 Tex. 251.

[2] Williams v. Rogers, 2 Dana (Ky.), 374; Shields v. Bogliolo, 7 Mo. 134; Thompson v. Kilcrease, 14 La. Ann. 340.

[3] Williams v. Rogers, 2 Dana (Ky.), 374.

§ 35. **Of parol contracts.** The authorities are not united in regard to the exercise of the right of rescission of contracts for the sale of lands resting wholly in parol, but which have been partly or fully executed by either of the parties. The question is usually presented in the case of actions brought to recover money advanced as part of the purchase price, and upon this point the authorities are in direct conflict. The more stringent cases hold that money advanced on a verbal contract for the purchase of land may be recovered back at any time at the option of the party advancing it. Such cases rest upon the theory that contracts of this character are void and without any legal consideration for the money advanced, and for that reason it may be recovered back, even though the vendor is ready and offers to convey.[1]

The decided weight of authority, however, supports a different view, with apparently the better reason. Parol contracts, as has often been adjudged, are not altogether void; nor does the statute of frauds make them so, but simply declares that no action shall be maintained upon them. The vendor may waive the statute, and in fulfillment of his contract convey the land as agreed; and if he offers so to do, it is difficult to perceive how the purchaser, who has advanced money upon such contract, can claim that the consideration upon which the money was advanced has failed, or that it was advanced without consideration.[2] Indeed, the principle may be considered as well settled that no right exists, under the statute of frauds, to reclaim money advanced on a purchase, where the other party is no way in fault, and is both able and willing to perform his contract and to make conveyance in the manner stipulated by the oral agreement, or to set aside such contract as a nullity. On the contrary, he who advances money in part payment of a parol purchase cannot recover it back until he has offered to fulfill the agreement, and the other party has repudiated it by refusing to perform. If he repudiates it himself, without default of the other party, he loses what he has paid.[3]

[1] Scott v. Bush, 26 Mich. 418; Grimes v. Van Vechten, 20 Mich. 410.

[2] Day v. Wilson, 83 Ind. 463.

[3] Crabtree v. Welles, 19 Ill. 55; Caughlin v. Knowles, 7 Met. (Mass.) 57; Day v. Wilson, 83 Ind. 463; Lane v. Shackford, 5 N. H. 130; Shaw v. Shaw, 6 Vt. 69.

§ 36. Renewal after rescission. As a general rule, a breach of contract by one party absolves the other from performance of its terms and conditions, and any method manifesting an intention to rescind will be sufficient to produce that effect. The party thus rescinding will thereby be precluded from insisting upon any of its terms or conditions unless in some manner the contract should be renewed. But an agreement for the sale of land, like all others not prohibited by law, may be renewed by the unequivocal act of the parties, and thenceforth it will be restored to its former vigor. Such renewal may be evinced by an express agreement of the parties, or, it seems, by acts which establish an intention to give it new force and effect; and when a breach has been waived or the contract is renewed it may then be enforced precisely as if it had never ceased to be obligatory.[1]

[1] Graham v. Holloway, 44 Ill. 385.

CHAPTER XXXII.

USE AND OCCUPATION.

§ 1. General principles.
2. Contract to convey does not confer right to possession.
3. Where contract fails through fault of vendor.
4. Where contract fails through fault of vendee.
5. Occupation by vendee after abandonment of contract.
§ 6. Occupation under void contract.
7. When vendee enters as tenant.
8. Possession acquired by fraud.
9. Allowance to fraudulent grantee.
10. Compensation recovered by *assumpsit*.
11. Compensation as for trespass.
12. Against the vendor.

§ 1. General principles. To sustain an action for the use and occupation of land there must be a contract, express or implied, which creates the relation of landlord and tenant, and imposes upon the defendant an obligation of payment for the use of the property. This is the universally conceded rule.[1] A person in the permissive occupancy of land will ordinarily be held to pay a reasonable sum for its use,[2] and in many cases a contract will be implied from slight circumstances; but where the facts are such as to rebut any expectation on the part of both parties of the payment of rent no such promise will be implied.[3] So, also, if the possession is tortious or adverse, the action will not lie, and the only remedy of the owner is in trespass or ejectment with damages in the nature of mesne profits.[4]

It is a remedy that was unknown to the common law, having been created by statute in England during the reign of

[1] Moore v. Harvey, 50 Vt. 297; Estep v. Estep, 23 Ind. 114; Dalton v. Landahn, 30 Mich. 349; Williams v. Hallis, 19 Ga. 313; Edmonson v. Kite, 43 Mo. 176; McNair v. Swartz, 16 Ill. 24; Scales v. Anderson, 26 Miss. 94; Brewer v. Craig, 18 N. J. L. 214; Boston v. Binney, 11 Pick. (Mass.) 1; Murdock v. Brooks, 38 Cal. 596; Ackerman v. Lyman, 20 Wis. 54.

[2] Rogers v. Libbey, 35 Me. 200; Clough v. Hosford, 6 N. H. 234; Little v. Martin, 3 Wend. (N. Y.) 219; Dwight v. Cutler, 3 Mich. 566.

[3] Hough v. Birge, 11 Vt. 190; Johnson v. Beauchamp, 9 Dana (Ky.), 124; Dwight v. Cutler, 3 Mich. 566; Collyer v. Collyer, 113 N. Y. 442.

[4] Langford v. Green, 52 Ala. 103; Howe v. Russell, 41 Me. 446; Byrd v. Chase, 10 Ark. 602; Edmonson v. Kite, 43 Mo. 176; Watson v. Brainard, 33 Vt. 88; Folsom v. Carli, 6 Minn. 420; Name v. Alexander, 49 Md. 416.

George II.,[1] and in this country is dependent upon legislative enactment for its existence.[2] In some instances its original scope has been much broadened, and recoveries have been permitted, not upon the theory of a contract of any kind, but upon the use of the premises; and in such cases, notwithstanding the occupant may in fact have been a trespasser, it has been held that the owner of the tenement might waive the trespass and recover in *assumpsit*, and that it would not lie with the tort-feasor to defeat him by interposing his own wrong.[3]

The authorities are united in declaring that the agreement to sell on the one hand and the agreement to purchase on the other, even when accompanied by a stipulation for possession, does not create the relation of landlord and tenant during the interval that exists between the inception and completion of the agreement. Nor will a mere stipulation for interest until the completion of the contract be sufficient to raise that relation, for such stipulation is not generally to be regarded as a compensation for the occupation of the premises, and, as a rule, is entirely independent of it. An agreement that until the conveyance shall be made the purchaser may have possession, and shall pay the vendor at the rate of a fixed sum per annum, would undoubtedly suffice to create the relation of landlord and tenant, and the sum thus reserved could be recovered as rent. So, too, if the contract fails through the fault or negligence of the vendee, or if he abandons the same, so that the relation of vendor and vendee no longer exists, he would be held to be a tenant at will or by sufferance and liable for an occupation rent.[4]

§ 2. **Contract to convey does not confer right to possession.** No principle is better established or more uniformly recognized than that the fee draws to it not only the right to but the constructive possession of land. These rights at law accompany the fee, and must be recognized and enforced.

[1] 11 Geo. II. ch. 19.

[2] There are American cases which hold that the action is maintainable at common law (see Gunn v. Scovil, 4 Day (Conn.), 228; Crouch v. Briles, 7 J. J. Marsh. (Ky.) 257), but the accepted doctrine is as stated in the text.

[3] See Oil Refining Co. v. Bush, 88 Pa. St. 335.

[4] See Smith v. Stewart, 6 Johns. (N. Y.) 46; Clough v. Hosford, 6 N. H. 234; Davidson v. Ernst, 7 Ala. 817; Dwight v. Cutler, 3 Mich. 566.

Hence the mere purchase of land, or a contract for the conveyance of the title at a future time, does not authorize the purchaser to enter and occupy without a license from the vendor.[1] A mere contract or covenant to convey at a future time upon the performance of certain acts, while it may create equities in favor of the purchaser, cannot be said, at least for the purposes of an action for use and occupation, to create an equitable title. At best it is but an agreement that may ripen into an equitable title on performance of the prescribed conditions; and where a party enters into possession of premises under a contract of purchase, the most that can be implied from such a contract is permission to enter while the conditions are maturing, as a tenant at will, and to occupy as such.[2]

§ 3. **Where contract fails through fault of vendor.** Where a vendee has been permitted to enter upon the possession of premises under an agreement to purchase the same, and through the fault of the vendor the sale is never consummated, notwithstanding the occupancy may have been beneficial to the vendee, he cannot be compelled to pay for such use in the absence of any stipulations to the contrary.[3] If the contract under which the entry was made is valid at law and enforcible in equity the vendor will never be permitted to maintain *assumpsit* for such occupation while the contract, though unperformed, is yet unrescinded and in full force; and a contract cannot arise by implication of law under circumstances the occurrence of which neither of the parties had in their contemplation. As the relation of landlord and tenant would not in such a case exist, the vendor could not recover in an action for use and occupation; and as the entry and holding by the vendee had not been tortious, there would be nothing to sustain an action for the mesne profits.[4]

§ 4. **Where contract fails through fault of vendee.** But while rent is not demandable for occupation pending the negotiation for a purchase, it is manifestly just that the vendor

[1] Williams v. Forbes, 47 Ill. 148; Chappel v. McKnight, 108 Ill. 570; Suffern v. Townsend, 9 Johns. (N. Y.) 35; Druse v. Wheeler, 22 Mich. 439.

[2] Dean v. Comstock, 32 Ill. 173.

[3] Vanderheuval v. Storrs, 3 Conn. 203; Smith v. Stewart, 6 Johns. (N. Y.) 46; Hough v. Birge, 11 Vt. 190; Hogsett v. Ellis, 17 Mich. 365.

[4] Thompson v. Bower, 60 Barb. (N. Y.) 463.

should have compensation for such occupancy in the event of a failure in the consummation of the sale occasioned by the vendee's refusal to perform on his part.[1] But while the general principle that the vendor is entitled to compensation for the occupation is conceded, the method by which it shall be awarded has often been a matter of dispute. At common law no action of *assumpsit* for rent would lie, except upon an express promise made at the time of the demise; and though this was changed by the English statute, which subsequently became general in this country, yet from its terms it applied only to a demise, and where the relation of landlord and tenant existed, founded on some agreement creating that relation. A vendee who enters under a contract of purchase confessedly does not sustain that relation; his entry is under an agreement conferring a color of title and which may be enforcible in equity. By refusing to conform to his agreement and perform the stipulations of the contract, it has been held that he changes himself into a trespasser; and that he was never strictly a tenant, or liable to an action for rent. In this view of the case he would be liable to ejectment as a trespasser, and responsible in that character for the mesne profits.[2] On the other hand it is fair to suppose that no man who enters upon the land of another permissively and continues to receive its beneficial use intends to hold the property or remain in its enjoyment without rendering a fair equivalent for the benefits received. This is one of the strongest presumptions of law,

[1] See Dwight v. Cutler, 3 Mich. 566; Smith v. Wooding, 20 Ala. 324; Bancroft v. Wardwell, 13 Johns. (N. Y.) 489; Clough v. Hosford, 6 N. H. 234; Patterson v. Stoddard, 47 Me. 355; Vanderheuval v. Storrs, 3 Conn. 203; Whittier v. Stege, 61 Cal. 238. A. made an oral agreement for the purchase of B.'s house, advanced the purchase money and took possession. Before A. obtained a deed the house was destroyed by fire, and he thereupon vacated possession of the ground, refused to accept a deed which B. tendered to him immediately after the fire, and commenced a suit against B. in which he recovered back the purchase money. *Held*, that A. during his occupation of the house was tenant at will, and that he was liable to B., in an action of *assumpsit*, for use and occupation. *Held*, also, that A., by refusing to accept a deed from B., determined the tenancy at will and was no longer liable to him for use and occupation. Gould v. Thompson, 4 Met. (Mass.) 224.

[2] Smith v. Stewart, 6 Johns. (N. Y.) 46; Bancroft v. Wardwell, 13 Johns. (N. Y.) 489.

and an implied promise is raised on the part of the beneficial occupant that he will pay a just sum by way of compensation. An entry under a contract for purchase, if permissive, is not tortious, and in no sense can it be called a trespass; neither does the purchaser expressly or impliedly agree to pay rent or to hold as a tenant. The relation is strictly that of vendor and vendee, and the occupation is referable to and measured by an authorization, which for want of a better term is called a license. The real terms of such license are that the vendee will faithfully observe and truly perform all of the conditions of his contract for purchase, and that pending completion he may anticipate possession. A failure on the part of the purchaser practically amounts to an offer to rescind; and if the vendor exercise his option to accept such offer, and declares the contract at an end, the license is revoked. The entry of the purchaser having been made peaceably and in subservience to the vendor's title, his possession for most practical purposes would be the same as a tenant; while by refusing to comply with the terms of the agreement under which he entered his possession is in one sense tortious. Hence, it would seem that so long as the purchaser offers to perform the contract his vendor cannot turn him out of possession; but if he refuses to complete the same, the vendor has a right to treat him as a trespasser or as a tenant at will at his election.[1]

§ 5. Occupation by vendee after abandonment of contract. The united current of modern authority has firmly established the doctrine that an occupancy of premises by the vendee, into which he has been permitted to enter under a contract of purchase after all negotiation for the purchase is at an end and the contract of sale has been rescinded, imposes upon him an obligation to respond to the vendor in such sum as the use of the premises is worth, and he will be held liable to an action for use and occupation at the suit of the vendor for the period during which he continued in possession after the abandonment of the contract.[2] During this time he is practically

[1] Whittier v. Stege, 61 Cal. 238; Lewis v. Hawkins, 23 Wall. (U. S.) 119; Suffern v. Townsend, 9 Johns. (N. Y.) 35.

[2] Howard v. Shaw, 8 Mees. & W. (Eng. Eq.) 118; Osgood v. Dewey, 13 Johns. (N. Y.) 240; Smith v. Wooding, 20 Ala. 324; Gould v. Thompson, 4 Met. (Mass.) 224; Hogsett v. Ellis, 17 Mich. 365; Dwight v. Cutler, 3 Mich. 566.

a tenant at will, and his occupation having been beneficial to him, that is a sufficient ground to imply a promise to pay a reasonable sum by way of compensation for such occupancy.

§ 6. **Occupation under void contract.** A purchaser who has entered under a contract of purchase that is illegal and void can predicate no rights thereon, and is, it seems, liable for the rent of the premises.[1]

§ 7. **When vendee enters as tenant.** It may happen that a vendee is let into possession, not under the contract of sale, but by virtue of some collateral or subsequent agreement, whereby a stipulated sum is reserved for the use and occupation of the premises pending the consummation of the contract and delivery of deed. In such event the relation of landlord and tenant is created, and an action would lie for use and occupation up to the time of the delivery of conveyance.[2] So, too, the conditions of the contract of sale may be such as to create a tenancy sufficient to furnish grounds for a demand for rent; as, where a contract of sale provides that the vendee may take possession of the property and use it, and that upon payment of the purchase money it shall become his, but that in default of payment he shall pay for the use, the vendee would become the lessee of the property.[3]

§ 8. **Possession acquired by fraud.** Where a purchaser has obtained possession of lands by fraudulent representations, and a decree of rescission has been entered, such purchaser should be treated as having entered with full knowledge that his entry was without right, and should be charged with the rents and profits.[4]

So, too, where the land has been acquired through the medium of a fraudulent conveyance, the grantee participating in the fraud, the deed will, as to the creditors of the grantor, be considered void *ab initio*, and the fraudulent grantee, where

[1] Mattox v. Hightshue, 36 Ind. 95.

[2] As where S. contracted with N. in writing to sell a house and lot, the deed to be executed at a future time, and at the same time made another oral agreement, whereby N. was to have possession of the premises until the delivery of conveyance, he paying therefor $70, *held*, that the contracts were distinct, and that the relation of landlord and tenant existed between N. and S. up to the time of delivery of conveyance. Nestal v. Schmid, 39 N. J. L. 686.

[3] Fairbank v. Phelps, 22 Pick. (Mass.) 535.

[4] Mosley v. Miller, 13 Bush (Ky.), 408.

the deed is set aside, will be compelled to surrender the possession and account for all the profits which he actually made or could have made out of the property fraudulently conveyed.[1]

§ 9. **Allowance to fraudulent grantee.** Where a conveyance is set aside as fraudulent as to the grantor's creditors, and an accounting is asked of the rents and profits from the grantee, he being a guilty participant in the fraud, the general rule is that "he who hath committed iniquity shall not have equity;" that the conveyance, being absolutely void, cannot be permitted to stand as security for any purpose of indemnity or reimbursement, and that the guilty grantee is entitled to no protection for any sum paid or liability incurred by him.[2]

It would seem, however, that the spirit if not the letter of recent decisions has to some extent modified the extreme rigor of this rule; and while the grant may still be treated as void from the beginning, yet, as the only way in which creditors can reach the rents and profits received by the grantee is by an accounting in equity, the accounting must be upon equitable principles.[3] While such a grantee will not be allowed for permanent improvements made upon the granted property to suit his fancy or simply to promote his supposed interests, yet when he is compelled to surrender the property conveyed to him, and to account for all the profits he has made or could have made or ought to have made therefrom, it seems that he is entitled to credit for taxes paid by him and for repairs made which were necessary for the preservation of the property and to keep it tenantable, as well as for interest paid on mortgages which were valid liens on the property.[4]

§ 10. **Compensation recovered by assumpsit.** To maintain an action of *assumpsit* for use and occupation a tenancy of

[1] Borland v. Walker, 7 Ala. 269; Allen v. Berry, 50 Mo. 90; Seivers v. Dickover, 101 Ind. 495.

[2] See Davis v. Leopold, 87 N. Y. 620; Allen v. Berry, 50 Mo. 90; Thompson v. Bickford, 19 Minn. 17; Borland v. Walker, 7 Ala. 269; R. R. Co. v. Soutter, 13 Wall. (U. S.) 523; Seivers v. Dickover, 111 Ind. 497; Le Row v. Wilmarth, 91 Mass. 382; Bernheimer v. Beer, 56 Miss. 149; Nipper's Appeal, 75 Pa. St. 478.

[3] See Murray v. Governeur, 2 Johns. Cas. (N. Y.) 438; Robinson v. Stuart, 10 N. Y. 189; Jackson v. Ludeling, 99 U. S. 513.

[4] See Loos v. Wilkinson, 113 N. Y. 485.

some kind is necessary. A promise to pay must be raised, as it is upon this promise that the case is prosecuted. But where a purchaser goes into possession by the consent and license of the vendor, to hold under him until a deed shall be given, and thereby enjoys the beneficial use of the premises, if he afterwards refuse to complete the contract he may properly be treated as a tenant at will and liable for use and occupation. It is quite certain that he might be proceeded against as a trespasser; and it is doing no more violence to the real contract or to the facts in the case to hold that the purchaser was during this time a tenant at will, and that the law implies a promise to pay reasonable rent for such use where the real contract is rescinded, than it is to hold that the purchaser originally with force and arms broke and entered the plaintiff's close, for such was in no sense the fact. The vendee by refusing to perform his contract puts himself in a position where he may properly be treated as a trespasser or as a tenant, with equal propriety, at the election of the owner, having placed himself in that position by his own wrongful act subsequent to his entry, though in fact he did not enter either as a trespasser or as a tenant.[1]

§ 11. **Compensation as for trespass.** Many of the authorities hold that trespass and not *assumpsit* for use and occupation is the proper remedy to pursue where one enters upon land under a contract of purchase and then fails to pay and refuses to perform the contract.[2]

§ 12. **Against the vendor.** The action will ordinarily lie against any person in the occupancy of land by permission of the owner—the law, in the absence of express contract, presuming a promise to pay a reasonable sum by way of compensation for such occupancy, unless there is something in the circumstances inconsistent with the notion of such a promise or of an obligation to pay. Upon this principle it has been held, both in England and America, that a vendor who remains in possession after the sale of the premises must respond to his vendee for their use.[3] A vendor thus remaining in the occu-

[1] Whittier v. Stege, 61 Cal. 238.

[2] Smith v. Stewart, 6 Johns. (N. Y.) 46; Little v. Libbey, 2 Me. 242; Keys v. Hill, 30 Vt. 762; Clough v. Hosford, 6 N. H. 233.

[3] Currier v. Earl, 13 Me. 216.

pancy of land after he has sold and conveyed them is practically a tenant at sufferance,[1] or at most a mere tenant at will.[2]

[1] Hyatt v. Wood, 4 Johns. (N. Y.) 150. Tenancy at sufferance is defined by Blackstone to exist where one comes into possession of land by lawful title, but keeps it afterwards without any title at all. Hence a vendor who remains in possession after sale or after the day fixed for the delivery of possession comes fairly within the spirit of the definition. See, also, Wood v. Hyatt, 4 Johns. (N. Y.) 313.

[2] Jackson v. Aldrich, 13 Johns. (N. Y.) 106.

CHAPTER XXXIII.

ACTIONS FOR POSSESSION.

§ 1. General principles.
2. By the vendor.
3. By the vendee.
4. By third persons.
5. Notice to quit.
6. Peaceful entry and repossession.
7. Forcible detainer.
8. Improvements by purchaser.
9. Defenses to the action.
10. Conclusiveness of judgment in ejectment.

§ 1. General principles. It is a rule of general and universal observance that the legal title to land draws to it the legal possession of the same, and this rule has often been applied in the solution of questions growing out of the relation of vendor and vendee. A contract of sale is prospective in its operation, and does not without special stipulation confer any rights of immediate occupancy upon the vendee. The legal title which the vendor retains until final execution is attended with all its legal incidents, including the right to hold, possess and enjoy the land; and the vendee cannot, at least until full payment has been made of the purchase money, claim any possessory rights in the premises he has contracted to purchase. The mere fact that a person has made a contract for the purchase of land does not entitle him to enter upon and hold it, and a purchaser's possession so obtained, in the absence of some agreement permitting him to enter, would be unauthorized and unlawful.[1] Yet where a party's land is in the actual possession of another, even though unlawfully, he has no right forcibly to repossess himself, but must resort to the action of forcible entry and detainer or the action of ejectment, or whatever other form of action the law may have provided to enforce a claim for the possession or delivery of specific real property.[2]

[1] Williams v. Forbes, 47 Ill. 148.

[2] Allen v. Tobias, 77 Ill. 169. It would seem that where a party is a mere intruder upon the possession of another, the latter will have the right to repossess himself peaceably if he can, and take measures to keep the intruder from re-entering. Brown v. Smith, 83 Ill. 291.

Where a party enters into possession of premises under a contract of purchase, the most that can be implied from such a contract is permission to enter while the conditions are maturing, as a tenant at will, and to occupy as such.[1] Generally the courts in referring to such occupation speak of the vendee's possession as acquired under and by virtue of a license, and while such occupation bears a nearer affinity to a tenancy at will than to any other form of estate which it may resemble, yet, in the absence of any reservation of rent or other method of compensation for such occupancy, it is not such a tenancy as to properly create the relation of landlord and tenant. For this reason the questions which have arisen in the course of the settlement of disputes growing out of the vendee's occupancy have not always been productive of a uniformity of decision.

The vendee in possession under an executory contract is in all cases under legal obligation to promptly pay the stipulated purchase money at the time or times when it may become due, and to faithfully perform any of the conditions precedent upon which the sale is based; and, failing in this, the vendor has a right to elect whether he will abandon the contract and re-enter upon his premises, or hold the vendee to his agreement, if the contract is such a one as can be enforced by compelling specific performance.[2] In the former event he may, if he sees fit, treat the vendee as his tenant, and recover against him for the use and occupation of the land,[3] or he may regard him as a trespasser and eject him by suit.[4] The possession of the vendee is not adverse to the vendor, in the legal sense of the term, but consistent with his title.[5]

The scope of this chapter does not contemplate more than a passing allusion to actions brought by third persons for the dispossession of the purchaser under an assertion of paramount title. The theme is too extensive for adequate treatment in a work of this character, and the reader is referred to works on

[1] Dean v. Comstock, 32 Ill. 173.

[2] Seabury v. Doe, 22 Ala. 207; Dean v. Comstock, 32 Ill. 173; Williams v. Forbes, 47 Ill. 148.

[3] Davidson v. Ernst, 7 Ala. 817.

[4] Hicks v. Lovell, 64 Cal. 14; Jackson v. Miller, 7 Cow. (N. Y.) 751; Gibbs v. Sullens, 48 Mo. 237; Dean v. Comstock, 32 Ill. 173; Harle v. McCoy, 7 J. J. Marsh. (Ky.) 318.

[5] Jackson v. Camp, 1 Cow. (N. Y.) 605.

ejectment and kindred topics. Incidental notice has already been had of one phase of the subject in speaking of fraudulent conveyances, and brief mention is made in other parts of the work of matters germane to the topic.

§ 2. **By the vendor.** Ejectment is not maintainable by a vendor against his vendee in possession under an executory contract of sale who is not in default in the performance of his contract, or who has performed it and is in position to demand a deed, or who seasonably and in good faith offers to comply with the terms of his purchase, and continues ready to comply with them.[1] To a vendee in possession under such circumstances the contract will avail him as a defense to an action of ejectment, or as a cross-action in equity to enforce a trust against his vendor, or to obtain a specific enforcement of the contract.[2]

But where a vendee who has been let into possession under such a contract fails to comply with the terms of the same, as where there has been default in the stipulated payments; or if after maturity of the purchase money the vendor tenders a deed and demands payment, which the vendee refuses to make; or if there has been a default in the performance of any of the conditions precedent to the execution of the conveyance; or if the vendee has abandoned the purchase and repudiates the title of his vendor,— then in every such case the vendee forfeits the benefit of the contract, and cannot avail himself of it as a defense to an action of ejectment by his vendor.[3] The vendor in such event has an option either to sue for a specific performance in a proper case or to abandon the contract and bring an action for the recovery of the land.[4]

[1] Prentice v. Wilson, 14 Ill. 91; White v. Livingstone, 10 Cush. (Mass.) 259.

[2] Love v. Watkins, 40 Cal. 548.

[3] Thorne v. Hammond, 46 Cal. 530; Jackson v. Moncrief, 5 Wend. (N. Y.) 26; Dean v. Comstock, 32 Ill. 173; Williams v. Forbes, 47 Ill. 148.

[4] Keys v. Mason, 44 Tex. 144. Where a contract is entered into for the sale of land by the terms of which the purchaser is to pay $500 down and enter into immediate possession of the premises, a second instalment to be paid in ten months and the residue at deferred periods, and the vendor is to execute a deed in two months, the vendor is entitled to maintain an action of ejectment on the default of the purchaser to pay the second instalment, although the first instalment was punctually paid and the vendor did not before bringing suit tender a deed. Wright v. Moore, 21 Wend. (N. Y.) 230.

The refusal of the vendee amounts to an abandonment on his part; and should the vendor in the exercise of his election assent to its abandonment, a complete dissolution of the contract is effected by the mutual and concurring assent of both parties;[1] and neither party may thereafter invoke its terms or protection as against the other.[2] The vendor is by this event restored to his original position; he cannot now sue for a breach nor compel a specific performance, because the contract itself has been dissolved; but he is at liberty to maintain ejectment to recover the possession of the land to which he has the legal title.[3]

A right of action will subsist in favor of the vendor where the vendee has been let into possession under a void sale;[4] as also where possession has been given him under an agreement that he would quit and surrender up possession if he should not pay the purchase money on a given day; and in such cases ejectment will lie without notice on failure to perform — the agreement operating in much the same manner as a clause of re-entry on breach of covenant in a lease.[5]

§ 3. By the vendee. Ejectment only lies where the ejector possesses the legal title; and however strong the equities may be, the rule, in general, is well established that such equities cannot prevail over the legal title. For this reason a vendee under an executory contract cannot maintain ejectment against his vendor, but must resort to a court of chancery to assert

[1] Graves v. White, 87 N. Y. 465.

[2] Hicks v. Lovell, 64 Cal. 14.

[3] Wright v. Moore, 21 Wend. (N. Y.) 230; Dean v. Comstock, 32 Ill. 173.

[4] A., the undisputed owner of a tract of land, entered into an agreement with sundry parties to convey it to them, and to execute deeds therefor in accordance with the various portions which should fall to each from a lottery held to determine each man's share. The lottery was held and lot No. 42 fell to B., and lot No. 38 to one C. B. and C. agreed to exchange their lots, and B. took possession of No. 42. Deeds for the several lots were executed but never delivered. There was some evidence that B. had put improvements on the lot, which were afterwards removed. In an action by A. against C. to recover this lot, *held*, that the defendant's claim to the lot, having its origin in a lottery contract, was void; and that, as the deed therefor was never delivered, this was a parol sale of land and void under the statute of frauds; and that the plaintiff's claim, resting upon an untainted legal title, unaffected by the collateral illegal contract, entitled him to a verdict. Allebach v. Godshalk, 9 Atl. Rep. (Pa.) 444.

[5] Smith v. Stewart, 6 Johns. (N. Y.) 46; Central Pac. R. R. Co. v. Mudd, 59 Cal. 585.

and establish his rights. But in some states, as in Pennsylvania, there are no courts of chancery, and equitable relief in such cases can only be administered in legal actions. Under such conditions an action of ejectment brought by a vendee against his vendor, under articles of sale, is the equivalent of a bill in chancery for specific performance, and may in all proper cases be maintained.[1] But in order to enforce a specific performance by ejectment the vendee must have paid or tendered the purchase money before bringing suit;[2] and where the possession of the vendor is lawful the vendee cannot maintain his action without proof of such previous payment or tender, and in case of a tender must also keep the same good by producing the money in court. Until he has thus put his vendor in default he has no cause of action; nor can he demand a verdict conditioned on his subsequent payment of the purchase money.[3]

With respect to third persons, but subject nevertheless to the rules first stated, a vendee in possession may defend the same, and upon the strength of his equitable title may oust any one not having a superior right of entry.[4] As against a mere trespasser, bare peaceable possession has often been held sufficient to maintain ejectment.[5]

§ 4. By third parties. The duty of the vendee with respect to full and rigid investigation of the title of the land he is about to purchase has already been pointed out; and if he has been derelict in this duty, or, having relied upon the representations or covenants of his vendor, has failed to investigate for himself, he is deemed to have accepted the title with notice of the superior rights of others if any such exist. The rule is fundamental that the legal title must prevail over a mere equity;[6] and, even though the purchaser may have clothed his equity by an apparent legal title from his grantor, he must still show that such title is paramount in order to defeat a recovery. It is a further rule, however, that the plaintiff in

[1] Rennyson v. Rozell, 106 Pa. St. 412. This is probably peculiar to the jurisprudence of Pennsylvania, and does not prevail to any extent in other states.

[2] Vincent v. Huff, 4 Serg. & R. (Pa.) 298.

[3] Bell v. Clark, 111 Pa. St. 92.

[4] Seymour v. Creswell, 18 Fla. 29; Wilson v. Glenn, 68 Ala. 383.

[5] Wilson v. Glenn, 68 Ala. 383.

[6] Wales v. Bogue, 31 Ill. 464.

ejectment must recover, if at all, on the strength of his own title, and not on the weakness of that of his adversary;[1] and the purchaser in possession may successfully defend by showing an outstanding title in another person superior to that asserted by the plaintiff,[2] even though he may not be able to connect himself with that title.[3]

§ 5. **Notice to quit.** As a general rule a notice to quit is never necessary unless the relation of landlord and tenant exists; and for this reason it has been repeatedly held that where a vendee enters under a contract of purchase, although with the consent of the vendor, the latter may maintain ejectment against him without a previous notice to quit.[4] But though the rule is very positively asserted in the earlier cases, yet an examination of the facts involved generally shows that it was applied only where the vendee who had thus entered had failed to perform his part of the contract under which he entered, and where the vendor had taken some steps to show that the contract was at an end; and while the principle has never been overruled and still controls as a settled proposition of law, it is nevertheless modified by the further doctrine that it is only to be applied when the right to retain possession has been in some manner forfeited by the purchaser. Hence, if the purchaser repudiates the contract under which he obtained possession, or fails to comply with its terms, the vendor is at liberty to treat the contract as rescinded and regain possession of the land by an action of ejectment; and in such case neither a demand of the possession nor a notice to quit is necessary.[5]

It would seem, however, that where a party acquires possession of land under an executory contract of purchase, and is not in default, the vendor cannot maintain ejectment against him until he has demanded possession or given him notice to quit. The possession of the purchaser being lawful in its inception does not become wrongful until he is called upon to

[1] Masterson v. Cheek, 23 Ill. 72; Marshall v. Barr, 35 Ill. 106.

[2] Hogans v. Carruth, 18 Fla. 587; Lee v. Cook, 2 Wyo. 305.

[3] Rupert v. Mark, 15 Ill. 540; Stuart v. Dutton, 39 Ill. 91.

[4] Jackson v. Miller, 7 Cow. (N. Y.) 751; Jackson v. Moncrief, 5 Wend. (N. Y.) 26.

[5] Prentice v. Wilson, 14 Ill. 91; Wright v. Moore, 21 Wend. (N. Y.) 230; Hotaling v. Hotaling, 47 Barb. (N. Y.) 163; Hicks v. Lovell, 64 Cal. 14.

restore it.[1] So, too, it has been held that no man who holds lands of another by such other's consent should ever be evicted without notice;[2] and as the relation of the vendee more nearly resembles that of a tenant at will than any other, there is much propriety as well as manifest justice in requiring that he should first receive notice before resort is had to more stern and summary measures. But where a vendee has failed to perform the conditions and agreements of the contract under which he entered, notwithstanding his possession was taken by and with the assent of the vendor, it would seem to be the general rule that no other or further notice is necessary than that of a termination of the contract, and that the vendor may maintain ejectment without first having given a notice to quit.

§ 6. **Peaceful entry and repossession by vendor.** Where a vendee in possession under an agreement of purchase vacates the premises at a time long past the period prescribed for the payment of the purchase money, and the vendor finding the property vacant re-enters and again possesses himself thereof, it cannot be said that in thus resuming dominion he is guilty of either a fraudulent or unlawful act. Had such possession been obtained by the vendor by force or fraud, the rule would probably be different; but having, in a peaceable manner, assumed possession of the property when apparently abandoned by his vendee, he has a right to retain that possession until a tender has been made of the purchase money with its accrued interest.[3]

§ 7. **Forcible detainer.** It would seem that an action of forcible detainer may lie at the instance of either party for a non-compliance with the terms of the contract, and that the same right extends to their assigns.

In the absence of express stipulations, the vendee under a contract of sale is not entitled to the possession of the premises at any time before the contract is executed by the delivery of a conveyance; and should he enter into possession prior to that time, he may be dispossessed by his vendor, if he refuse to

[1] Prentice v. Wilson, 14 Ill. 91.
[2] Jackson v. Longhead, 2 Johns. (N. Y.) 75; and see Jackson v. Miller, 7 Cow. (N. Y.) 747.
[3] Bell v. Clark, 111 Pa. St. 92.

surrender the same on demand.[1] So also, although the vendee's entry may have been peaceable and permissive, but subject to condition, a non-compliance with or refusal to perform the same might have the effect of an illegal and constructively forcible detainer, in which event it would not be necessary for the vendor to declare a forfeiture of the contract in order to the maintenance of the action.[2]

Where the vendor brings forcible detainer against the purchaser to recover possession for non-compliance with the contract of sale, it will be sufficient to show that the purchaser at the time suit was brought was in possession by himself, or by others holding under him; and the purchaser, having failed to comply with the terms of his agreement, will be estopped to deny his vendor's right to the possession, and the vendor will not be required to prove any prior possession in himself.[3] In such case the written agreement of the parties, together with evidence tending to show a failure to comply, may properly be introduced.[4] A judgment in such action, of course, goes only to the right of immediate possession. It would not have the effect as against the vendee to enforce a forfeiture or work a rescission, and the vendor might still have a specific performance if equity was in his favor.[5] In other words, where a purchaser in possession is put in default, and the vendor elects to sue for the possession of the land by unlawful detainer, such possessory action does not affect any equities that might exist between the parties.[6] In some states ejectment is strictly a real action for the establishment and recovery of title as well as possession, and is not, technically even, an action of tort; yet as between vendor and vendee, even though the judgment be considered as conclusive upon the issues raised, it would not preclude a resort to equity for the determination and enforcement of the vendee's rights.

§ 8. **Improvements by purchaser.** An allowance for improvements in favor of a purchaser who had made his expenditures in good faith supposing that he was the owner under a conveyance which turned out to be void was denied in some

[1] Wright v. Blachley, 3 Ind. 103.
[2] Monson v. Stevens, 56 Ill. 335.
[3] Lesher v. Sherwin, 86 Ill. 420.
[4] Lesher v. Sherwin, 86 Ill. 420.
[5] Monson v. Stevens, 56 Ill. 335.
[6] Moak v. Bryant, 51 Miss. 560.

of the earlier cases, or if allowed was only permitted to prevail so far as to offset or recoup in damages the value of such improvements or accessions against the owner's claim for rents and profits during the occupancy of the person who made the improvements upon the property.[1] But this doctrine has been generally disapproved in later cases, and purchasers in good faith are generally allowed for permanent improvements made by them under an honest but mistaken supposition that they were the absolute owners of the property.[2] This was the rule of the civil law in regard to industrial accessions to the property of another, innocently made by a *bona fide* possessor; and while the civil-law rule in its entirety has never been adopted, either in England or the United States, the principle has always been permitted to prevail where the industrial accessions have been made in good faith by a person who has the legal title to the property, so that the real owner is compelled to resort to chancery to assert his equitable title to such property; and in such cases courts have uniformly acted upon the civil-law rule of natural equity, and compelled the complaining party to compensate the adverse party for such industrial accessions or improvements as a condition of granting the equitable relief asked for in the suit.[3] In fixing the value of such improvements the cost is not necessarily the standard, but so far as they are permanently beneficial to the estate, and have enhanced its value, they should be paid for.[4]

[1] See Putnam v. Ritchie, 6 Paige (N. Y.), 390.

[2] Bright v. Boyd, 1 Story (C. Ct.), 478; Troost v. Davis, 31 Ind. 34; Pool v. Johnson, 62 Iowa, 611; Thomas v. Evans, 105 N. Y. 611; Canal Bank v. Hudson, 111 U. S. 66; Sohier v. Eldredge, 103 Mass. 345; Mills v. Tobie, 41 N. H. 84. In Mickles v. Dillaye, 17 N. Y. 86, the rule was applied to a mortgagor who attempted to redeem from a mortgagee in possession under a voidable sale, and the rule adopted is expressed in the head-note of the case as follows: "When valuable and permanent improvements have been made in good faith by a person standing upon the legal footing of a mortgagee in possession, but who supposed himself to have acquired the absolute title, and such mistake was favored by the omission of the owner, for several years before and after the improvements, to assert any interest in the premises, the mortgagor, on asking the aid of equity to redeem, will be compelled to allow the value of the improvements, though exceeding the rents and profits received."

[3] Putnam v. Ritchie, 6 Paige (N. Y.), 390; Gilbert v. Peteler, 38 N. Y. 170; Graeme v. Cullen, 23 Gratt. (Va.) 298; Freichnecht v. Meyer, 39 N. J. Eq. 561; Canal Bank v. Hudson, 111 U. S. 83; McSorley v. Larissa, 100 Mass. 272.

[4] Miner v. Beekman, 50 N. Y. 337; Doe v. Doe, 31 Fed. Rep. 99; Smith v.

In every such case good faith and innocent mistake are essential elements; for if a purchaser with notice of another's title makes improvements, he has no claim to be reimbursed therefor, and no lien upon the premises for his expenditures.[1] This is upon the principle that, where a party knowingly makes improvements upon the lands of another without the consent or fault of the latter, he cannot obtain reimbursement for such expenditures, even to the value of the benefit conferred upon the true owner. And it is immaterial, in such case, that there has been no moral turpitude involving bad faith on the part of the person so making such improvements; for, if he has purchased with actual or constructive notice of another's rights, he is without protection save as he can find it in the lapse of time or other equity, which, under the same circumstances, would afford a protection to his grantor.[2]

It has been said that courts of chancery do not give to an occupant compensation for improvements unless there are circumstances attending his possession which affect the conscience of the owner, and impose upon him an obligation to pay for them or to allow their value against a demand for the use of the property;[3] but while this is true, and, so far as it appertains to the claim of a possessor whose title originates in fraud, or is attended with circumstances of circumvention and deception, is sufficient to defeat an allowance of compensation for improvements,[4] yet the volume of authority seems to have settled the rule that a *bona fide* purchaser who has manifestly added to the permanent value of an estate by his ameliorations and improvements without suspicion of infirmity in his title should be allowed for them as against the paramount title

Drake, 23 N. J. Eq. 302; Preston v. Brown, 35 Ohio St. 18; McLaughlin v. Barnum, 31 Md. 425. But see Cross' Appeal, 97 Pa. St. 471.

[1] Davidson v. Barclay, 63 Pa. St. 406; Cannon v. Copeland, 43 Ala. 252; Dart v. Hercules, 57 Ill. 446; and see Saible v. Ferry, 32 N. J. Eq. 801.

[2] Thus, a purchaser with notice of an outstanding mortgage, although he may have acted ignorantly and in good faith, is not entitled to have the value of the improvements made by him deducted from the proceeds of the sale of the mortgaged premises. If the value of the land has been enhanced by the improvements, he may enjoy the benefit by paying the debt, or he will secure it in the increased price for which the land will sell. Hughes v. Edwards, 9 Wheat. (U. S.) 489.

[3] Jackson v. R. R. Co. 99 U. S. (9 Otto), 513.

[4] Morrison v. Robinson, 31 Pa. 456; Russell v. Blake, 2 Pick. (Mass.) 505.

when asserted; that the rule should be applied by a court of equity whenever the owner of land is obliged to invoke its aid to maintain his title against a person who has acquired a legal title in good faith; and that such person has a lien or charge upon the property for the increased value he has given to it, which a court of equity will enforce against the true owner whenever a suit at law is brought against the purchaser.

So, too, it has been held that where one in possession of land, held *bona fide* as his own, has erected buildings thereon, he or those claiming under him may remove them without incurring any responsibility to the owner of a paramount title.[1]

The law, as enacted in most of the states, has made liberal provision for the ascertainment and adjustment of the rights of occupying claimants, which is intended to afford a speedy method for fixing the value of permanent improvements made prior to notice of adverse titles.

With respect to the rights of the owners of mere equities, the reason of the law does not apply as in the case of one clothed with the legal title; and the general rule may be stated as that, where one places improvements on land owned by another whose title is of record, he has no right to a claim for compensation.[2] This rule, in its main features, has never been questioned; but modern practice has introduced many modifications, and, notwithstanding a vendor may recover possession as against his vendee in many instances, yet, if it appears that the vendee was placed in possession by the vendor, and he can present equitable claims for compensation for improvements he has made while so in possession, he will be permitted to recover for the same.[3]

[1] Wickliffe v. Clay, 1 Dana (Ky.), 591. In this case the rule is also laid down that if one buys land with buildings upon it, which he moves off, and then loses the land by a better title appearing, his vendor upon a rescission of their contract will be entitled to retain out of the consideration to be restored the value of the buildings so removed — not their estimated value at the time of the sale, but so much as they would have been worth, preserved with common care, as additions to the land at the time of the eviction, equivalent to what the occupant could have recovered for them of the successful claimant. And where the removal was without the consent or privity of the party against whom the decree for a restoration of the purchase money is obtained, he may, because of the difficulty of the proof, elect to retain the value of the buildings according to the above rule, or as movable structures.

[2] Dawson v. Grow, 29 W. Va. 333.

[3] As where, in an ejectment suit, it

§ 9. **Defenses to the action.** At common law an equitable title is no defense to an action of ejectment,[1] for in that form of action the legal rights of the parties can only be considered, and the legal title must prevail. But under the codes of civil procedure so generally adopted throughout the country a marked departure from common-law rules in this respect is manifest, and in many states equitable defenses may be set up to defeat actions at law for the recovery of land.[2] Yet, to prevail against the plaintiff's legal right to the possession in ejectment, whenever equities are pleaded as a defense they must be such as would, under the chancery practice, have justified a court of equity, upon a bill filed setting up the facts, in enjoining the legal owner from proceeding at law.[3] Thus, where a vendee in possession under an executory contract is sued in ejectment by his vendor or the person holding the legal title, if all the conditions of the contract under which he entered have been performed on his part, he may avail himself of his equitable title as a defense to the action.[4] Such is the general rule now in force in all states where law and equity are administered in the same court and in the same form of action; and the principle has been recognized and applied even in those states where the distinction still obtains, and where equitable remedies are still preserved as distinguished from actions at law. Indeed, it may be considered as a settled doctrine pertaining to this form of action, that where a person has purchased lands under a contract and has been let into possession, and has fully performed on his part, such facts may constitute

appeared that plaintiff put defendant into possession and authorized him to make improvements pending the consideration of defendant's application to purchase, which application was rejected finally and ejectment brought. *Held*, that defendant was entitled to have the value of his improvements adjudged a lien upon the land. Hannibal, etc. R. R. Co. v. Shortridge, 86 Mo. 662.

[1] Fleming v. Carter, 70 Ill. 286; Suttle v. R. R. Co. 76 Va. 284.

[2] See Love v. Watkins, 40 Cal. 547; Williams v. Murphy, 21 Minn. 534; Sower v. Weaver, 78 Pa. St. 443; Collins v. Rogers, 63 Mo. 515; Ten Broeck v. Orchard, 74 N. C. 409. A contract for the purchase of land, after performance by the vendee of the terms of the contract and the accruing of a right to a deed, is a sufficient color of title whereon to base a defense of adverse possession in an action of ejectment by the vendor for the recovery of the premises. Briggs v. Prosser, 14 Wend. (N. Y.) 227.

[3] Williams v. Murphy, 21 Minn. 534.

[4] Love v. Watkins, 40 Cal. 547.

a defense in an action of ejectment brought by the vendor,[1] particularly where the vendor has legally failed to rescind the contract by returning the proceeds received by him under it, or, as it is stated in the books, by placing or offering to place the vendee *in statu quo*.[2]

The cases in which the foregoing doctrines have been enunciated all involved the consideration of an established contract reduced to writing and unbroken by the party relying upon the equity as a defense. Where, however, the contract rests in parol a different view is presented. By the statute of frauds such a contract has no legal validity; nor will part performance, in a court of law, have the effect to take the contract out of the operation of the statute. Hence, even though the facts be admitted, such contract, in the absence of statute, would constitute no defense to an action of ejectment,[3] and the vendee would be obliged to seek relief in equity for an injunction to restrain the prosecution of the ejectment suit and for a specific performance of the contract.[4]

It is well established, however, that a vendee who has been let into possession under a contract of purchase can neither show title in himself nor set up an outstanding title in another as a defense to an action brought against him by the vendor.[5] In this respect there appears to be a marked exception to the general rule which permits the defendant to set up a superior title in a third person, even though he may be unable to connect himself with it. So, too, notwithstanding the rule that a plaintiff must recover on the strength of his own title and not on the weakness of that of his adversary, yet where, as in the

[1] Stow v. Russell, 36 Ill. 23.

[2] Staley v. Murphy, 47 Ill. 241.

[3] Dale v. Hunneman, 13 Neb. 221.

[4] The plaintiff, in an action of ejectment, sold a farm to A. on a credit of ten equal annual payments, and A., with his consent, sold thirty-two acres of the same to the defendant in ejectment, it being verbally agreed that, when the defendant paid the price and A. should pay the same to the plaintiff, the latter would convey to the defendant. The defendant completed his payment, which was paid to the plaintiff and credited on A.'s contract, and plaintiff afterwards sought to recover the land in ejectment. *Held*, that the claim of A. to the tract so purchased by him, in its fullest extent, constituted no defense to the action of ejectment, and that the defendant's recourse for relief was in a court of equity. Fleming v. Carter, 70 Ill. 286.

[5] Livingston v. Walker, 7 Cow. (N. Y.) 637; McClure v. Englehart, 17 Ill. 47.

case of vendor and vendee, the defendant is admitted to possession under a contract of purchase, the vendor, in an action to regain possession, is not required to make any proof of his title.[1]

§ 10. Conclusiveness of judgment in ejectment. The general doctrine applicable to cases tried in the common-law form in the action of ejectment formerly denied to a verdict and judgment in such action the conclusive effect which they have in other actions;[2] but with the abolition of legal fictions and the radical change which a few years back was wrought in the character of the action, the old doctrine has practically been superseded. In a few of the eastern states, where old forms still survive to some extent and old methods still continue to be resorted to, there would seem to be a tendency to adhere to the English rule; but in a great majority of the states the rule is that a title once fairly determined shall not be again disturbed or litigated as between the parties, and that a judgment in ejectment is of the same binding force and efficacy as any other judgment. In some states this results from the express declaration of the statute, while in others it follows from the general provisions relative to the trial and determination of all controversies; and the general doctrine now is that a judgment in ejectment has the same effect upon the parties and those in privity with them as any other judgment in a common-law action.[3]

[1] Tilghman v. Little, 13 Ill. 239; and see McKibben v. Newell, 41 Ill. 461.

[2] It was said that a verdict and judgment in an action of ejectment was never conclusive, either by way of evidence or as a plea in bar; and that one trial and judgment was no bar to another action of ejectment. The reason for this was that, as the action was brought to recover possession of lands founded upon a right of entry, the party claiming was supposed to have entered and sealed a lease, and the lessee brought the action upon his demise. Every such entry and demise, although a fiction in law, was supposed to give a new right of action.

[3] See Barrows v. Kindred, 4 Wall. (U. S.) 399; Merryman v. Bourne, 9 Wall. (U. S.) 592; Hinton v. McNeil, 5 Ohio, 509; Lamar v. Knott, 74 Ga. 379; Baze v. Arper, 6 Minn. 220; Mann v. Rogers, 35 Cal. 316.

CHAPTER XXXIV.

ACTIONS FOR THE PURCHASE MONEY.

ART. I. VENDOR'S ACTION FOR PRICE.
ART. II. VENDEE'S DEFENSES.
ART. III. VENDEE'S ACTION TO RECOVER BACK PRICE.
ART. IV. PAROL CONTRACTS.

ART. I. VENDOR'S ACTION FOR PRICE.

§ 1. General principles.
2. As affected by the statute of frauds.
3. Collateral and superadded agreements.
4. Where acts are concurrent.
5. Payment of money into court.

§ 1. General principles. An action at law for money had and received will lie at the instance of either party to a contract of sale, and may be resorted to in a proper case instead of the other remedies which the law affords. It may always be maintained by a vendor, in no default himself, to recover the unpaid purchase money, and is equally available by the vendee who has paid any part of the purchase price where the vendor refuses or is unable to complete his engagement. The vendee, in such case, may either affirm the contract and sue for damages, or he may disaffirm it and bring his action for money had and received to his use.

Nor is it material, so far as respects the legal rights of the parties, whether the contract be executory or executed. In the former event the promise of the vendee is sufficient grounds on which to base the vendor's action, and in the latter the fact of non-payment may always be shown. The consideration of a deed is a fact which is always open for inquiry, and is not affected by the statute of frauds. The action in such case is not considered as brought upon a contract for the sale of lands or any interest therein. The contract is regarded as perfected by the delivery of the deed, and the claim is for its value; the law raises the promise to pay, and usually it is immaterial what may have been the origin of a debt if it is founded on a lawful

consideration. Hence, such a case is not within the statute of frauds, although it may be raised from an agreement concerning an interest in lands. This doctrine was early adopted by the American courts, and it has frequently been held that *assumpsit* will lie to recover the purchase money of land sold.[1] So, too, while parol proof cannot be admitted substantially to vary or contradict a written instrument, yet this principle has no application to a case where the payment or amount of the consideration becomes a material inquiry.[2] On the sale of property the purchase money becomes due upon the delivery of the property to the purchaser, when no time is specified for payment; and this rule applies as well to the sale of real estate as to that of personal property. And while a deed, as a rule, must speak for itself, yet the acknowledgment of the payment of the purchase money is treated only as a receipt, and, like any other receipt, is subject to be contradicted, explained or varied in its terms by extrinsic evidence.[3]

Questions relative to the rights and obligations of the parties while the contract remains executory arise mainly in legal actions, where *assumpsit*, or its equivalent action, is brought to recover all or a portion of the stipulated price, and in the determination of such questions legal rules only are applicable; but where there has been a conveyance with notes or bonds to evidence the unpaid balance of purchase money the action is usually of an equitable character, and in most instances is brought to foreclose the mortgage given to secure the deferred payments. In such actions a wider range of inquiry is permitted, and defenses may be introduced which would be inadmissible at law. So, too, in many cases of executory contracts resort may be had to equity either for a rescission and a return of the purchase money paid, or as an auxiliary remedy where the defendant who has been sued at law desires to interpose defenses or obtain relief which a court of law could neither entertain nor grant. In the discussion of the subject no

[1] Shepard v. Little, 14 Johns. (N. Y.) 210; Pomeroy v. Winship, 12 Mass. 514.

[2] Bassett v. Bassett, 55 Me. 127; Millard v. Hathaway, 27 Cal. 119; Speer v. Speer, 14 N. J. Eq. 240; Rabsuhl v. Lack, 35 Mo. 316; Bratt v. Bratt, 21 Md. 578; White v. Miller, 22 Vt. 380; Elder v. Hood, 38 Ill. 533.

[3] Elder v. Hood, 38 Ill. 533; Shepard v. Little, 14 Johns. (N. Y.) 210; Clapp v. Linell, 20 Pick. (Mass.) 247.

attempt has been made to separate the legal and equity jurisdictions; but with this suggestion it is believed that no confusion will result thereby, and that the practitioner will readily distinguish between them.

§ 2. **As affected by the statute of frauds.** Repeated adjudications have firmly established the doctrine that agreements relative to the consideration to be paid for a conveyance of land need not be in writing in order to be enforced after the conveyance has been made;[1] while it is equally well settled that parol evidence is admissible to show that the consideration expressed in a deed to have been received by the grantor has not, in fact, been paid by the grantee.[2] It is true that non-payment of the consideration acknowledged in the deed cannot be proved for the purpose of defeating the conveyance; but for all other purposes such acknowledgment is regarded only as a receipt for money, and as such liable to be contradicted, varied or explained by extrinsic evidence.[3] A claim for the unpaid purchase money is now generally regarded as the simple assertion of the guarantied right, that a promise of payment is raised by law whenever one person receives the property of another by way of sale; and while, in the case of a sale of real estate, it is a promise raised from an agreement concerning an interest in lands, yet it is not within the statute of frauds as being an attempt to charge another upon a contract for the sale of lands or any interest therein. That contract was perfected by the giving of the deed, and an action for the purchase price is simply a claim for the payment of the value of the land. It is immaterial what may have been the origin of a debt if it is lawful in its character and founded upon a sufficient consideration.[4] In the application

[1] Strong v. Kamm, 13 Oreg. 172, where it was held that the agreement of the purchaser to pay part of the price to a third person need not be in writing. But see Liddle v. Needham, 39 Mich. 147, where A. and B. made a verbal agreement that, if A. would convey certain land to B.'s son, B. would give his note for a certain sum. *Held*, that A., though he had conveyed the land to B.'s son, could not maintain an action upon the agreement for B.'s refusal to give the note.

[2] Bowen v. Bell, 20 Johns. (N.Y.) 338.

[3] Elder v. Hood, 38 Ill. 533; Speer v. Speer, 14 N. J. Eq. 240; Millard v. Hathaway, 27 Cal. 119; Shepard v. Little, 14 Johns. (N Y.) 210; Clapp v. Linell, 20 Pick. (Mass.) 247.

[4] Bowen v. Bell, 20 Johns. (N. Y.) 338.

of this rule courts refuse to make any distinction between real estate and personal property;[1] and the doctrine may be considered as firmly established that, where the vendor has agreed to release or convey his right and title to land for a sum certain, which the vendee has agreed to pay, and the vendor, in pursuance of such agreement, has executed and delivered a deed to the vendee, notwithstanding the fact that in such deed he has acknowledged the receipt of the purchase money, yet, if the same has not in fact been paid, and the vendee has taken possession of the land, the vendor may maintain an action of *assumpsit* against him to recover the amount of the consideration money so agreed to be paid, and that such contract is not within the statute of frauds.[2]

It seems, also, that an executory contract for the sale of lands, signed and sealed by the vendor only, and delivered to and accepted by the vendee, and which purports to contain, on the part of the latter, a covenant to pay the consideration money, may be enforced against such vendee by an action of *assumpsit*.[3]

§ 3. Collateral and superadded agreements with respect to purchase money. Where no question arises as to the validity of the title of the property sold, nor as to the form or effect of the conveyance by which it was transferred, superadded or collateral agreements relative to the payment of the purchase money may usually be enforced in favor of the vendor or other persons; and the fact that such superadded agreements may rest wholly in parol has been held not to vary or affect the force of this rule. Thus, it has been held that a parol agreement to give bonds for the payment of the purchase money to the heirs of the vendor, the vendee having entered into possession of the property under such agreement, is not within the statute of frauds, and an heir of the vendor may maintain an action for the recovery of his part of such purchase money, notwithstanding the fact that such bonds were not given.[4]

[1] Elder v. Hood, 38 Ill. 533.

[2] Shepard v. Little, 14 Johns. 445. (N. Y.) 210; Pomeroy v. Winship, 12 Mass. 514; Hebbard v. Haughian, 70 N. Y. 54; Bratt v. Bratt, 21 Md. 578; White v. Miller, 22 Vt. 380.

[3] See Gale v. Nixon, 6 Cow. (N. Y.)

[4] Hillegass v. Hillegass (Pa.), 5 Atl. Rep. 736.

§ 4. **Where acts are concurrent.** Where a contract of sale contains mutual dependent covenants with respect to the payment of the purchase money and the conveyance of the estate, neither party can maintain any action upon it against the other without averring and proving performance or a readiness and willingness to perform,[1] and, according to some authorities, notice to the other party of readiness and willingness. But where the contract stipulates that the purchase money is to be paid on or before a specified day, and that a conveyance is to be executed at a subsequent time, the covenants are independent, and an action may be maintained for the purchase money after the day specified for its payment without making or offering to make a deed.[2]

Where the contract contains covenants by the purchaser to pay in instalments, the vendor may sue for each instalment as it becomes due.[3]

§ 5. **Payment of money into court.** In the case of an executory contract a court will not order the purchase money to be paid before a title is given, unless under special circumstances — such as taking possession contrary to the intention or against the will of the vendor, or where the purchaser makes frivolous objections to the title, or throws unreasonable obstacles in the way of completing the purchase, or is exercising improper acts of ownership, by which the property is lessened in value. Where such circumstances exist the purchaser might be compelled to pay money into court pending the settlement of disputes concerning the title.

But where the vendor has thought fit to put the purchaser into possession upon an understanding and agreement not to require the payment of the consideration until the vendee can be invested with title, such vendee cannot be called upon to bring the money into court. In such event the vendor must abide by his agreement, and cannot call upon the court to interfere and compel the purchaser to part with his money before

[1] Baston v. Clifford, 68 Ill. 67.

[2] Broughton v. Mitchell, 64 Ala. 210; Sparta Bank v. Agnew, 45 Wis. 131; Battey v. Beebe, 23 Kan. 81.

[3] The fact that the contract contains provisions that on default of payment of any instalment the contract may be determined at the vendor's option, and all payments forfeited, does not confine the vendor to the remedy by strict foreclosure. Sparta Bank v. Agnew, 45 Wis. 131.

he has a title.[1] It has further been held that the purchaser will not be compelled to pay the purchase money into court before the completion of the title where the vendor has voluntarily permitted him to take possession without any stipulation or agreement about paying the purchase money; and so, if the purchaser be in possession under a title anterior to the contract, or provided possession were given independently of the contract, and there is laches on the part of the vendor in completing title, then the court will not order the purchase money to be paid in.[2]

[1] Birdsall v. Waldron, 2 Edw. Ch. (N. Y.) 315; Stevenson v. Maxwell, 2 Sandf. Ch. (N. Y.) 279; Johnson v. Sukeley, 2 McLean (C. Ct.), 563.

[2] Birdsall v. Waldron, 2 Edw. Ch. (N. Y.) 315.

Art. II. Vendee's Defenses.

§ 1. Fraud.
2. Defective title — Executed contract.
3. Continued — Executory contract.
4. Deficiency in quantity.
5. Defective quality.
6. Personal disability.
7. Unconscionable bargains.
8. Agreements to forbear.
9. Agreements to rescind.
10. Purchaser may defend with cross-action pending.
11. Set-off.
12. Assignees of the purchase money.
13. Where vendor repossesses himself of the land.
14. Relief by way of injunction.

§ 1. Fraud. Whenever a party has been induced to enter into a contract which is a fraud upon him, he may, upon the discovery of the fraud, rescind the contract and bring his action to recover whatever he has paid upon it, or for the value of whatever he may have rendered or furnished under it. This is the rule generally stated; and that the contract is for an estate or an interest in lands does not change or vary it.[1] If either party, by the representation of facts concerning the situation, quality, ownership, possession, etc., of lands which they knew to be false, has induced the other to enter into a contract which he otherwise would not have done, and which is to his damage, then the contract is tainted with fraud, and void, and any suit brought upon such contract may be successfully resisted for this reason.

Statements by a vendor to a purchaser as to matters of opinion or judgment respecting the property sold do not, in the absence of any relations of trust or confidence, constitute fraud, although known by the vendor to be false;[2] yet the representations of one who has been in the actual occupation and use of land, and purports to speak from actual results, so far combine matters of fact with matters of opinion that a pur-

[1] Rickord v. Stanton, 16 Wend. (N. Y.) 25; Brown v. Manning, 3 Minn. 35.

[2] Wise v. Fuller, 29 N. J. Eq. 257. Where the vendor of land represented to the purchaser that it contained a large and valuable mineral deposit, *held* that, in the absence of any showing that there was no mineral in the land as represented, a mere exaggeration as to the amount of the deposit would not constitute such a fraud upon the purchaser as to avoid a note given for the purchase money. Dawson v. Graham, 48 Iowa, 378.

chaser is justified in placing some reliance on them.[1] The simple fact of falsity in representation, however, whether made in respect to situation, condition, quality or quantity, will not ordinarily furnish a defense to an action for the purchase money, unless such representations were made fraudulently and with intent to deceive the purchaser.[2] An apparent deviation from this rule has been permitted in some instances upon the ground that the representations might justly be regarded as warranties, and for a breach of which the purchaser might recoup in damages when sued upon the contract; but this has only been permitted in extreme and clearly defined cases.[3] Where the purchaser is allowed to recoup the amount of damages sustained by him, in consequence of misrepresentations of the vendor, against a demand for the purchase money, such amount should be deducted from the purchase money as of the day of the purchase.[4]

In contracts of sale which have been fully executed on the part of the vendor by the delivery of conveyance of the land sold, no fraud on his part in making the contract can operate as a complete bar to an action for the price, unless the land so sold was absolutely worthless, or unless the vendee has re-

[1] Wright v. Wright, 37 Mich. 55; Estell v. Myers, 54 Miss. 174.

[2] Josselyn v. Edwards, 57 Ind. 212. The rule in equity would seem to be more liberal, and it has been held that a defendant may plead as a defense to notes and mortgage given for land, that the plaintiff made false representations as to the quality of the land sold, and that it is not essential that the representations should have been known to be false by the person making them. Relief will be granted in such case on the ground of mutual mistake. Sweezey v. Collins, 36 Iowa, 589.

[3] As where a purchaser of a river plantation, being a stranger to the region and unacquainted with the peculiarities of the river, relied in making his purchase on representations of the vendor, an old resident, as to frequency and extent of overflow, which representations were untrue, *held*, that he might be allowed, under the circumstances, to recoup his damages against the vendor's suit for the price, regarding the representations as warranties, although they were not made fraudulently and were not incorporated in the contract. Estell v. Myers, 54 Miss. 174. And so in Wilson v. Randall, 67 N. Y. 338, where by mistake, induced in whole or in part by the untrue though not fraudulent representation of the vendor, the vendee paid for more land than was actually conveyed to him, it was held that he should recover back the money paid for the land in excess of the actual quantity. And see Tarbell v. Bowman, 103 Mass. 341.

[4] Estell v. Myers, 56 Miss. 800.

turned or offered to reconvey the property on the discovery of the fraud. It would seem, however, that when sued for the price the vendee may, in general, avail himself of the fraud by way of recoupment, though he has not returned or reconveyed the property.[1] But while he retains the property he cannot treat the contract as wholly void and refuse to pay anything; for by such retention he in effect affirms the validity of the sale, and can be entitled to nothing more than the actual damages he has sustained by reason of the fraud. So, too, where a party is induced to enter into an executory contract for the purchase of lands by means of fraud or false representations on the part of the vendor, if after discovery of the fraud he accepts a conveyance, he cannot set up the fraud as a defense in an action for the purchase money.[2] While the contract remains executory a false representation would be sufficient to exonerate the vendee from any obligation to fulfill his contract, and he would then be justified in repudiating the same; but if with knowledge of the fraud he takes a conveyance, thereby electing to carry the contract into execution, he is bound to pay the balance of the purchase money as agreed. In other words, he cannot be permitted to reap the fruits of the bargain by taking the property, thus fulfilling in part, and then repudiate the performance of the obligation to pay.

§ 2. **Defective title — Executed contract.** The rule is well established that, where there has been no fraud or misrepresentation, a purchaser of land who has received a deed therefor and entered into possession will not be relieved from payment of the purchase money on the ground of defective title;[3] nor by showing a paramount title in a third person

[1] Where land lying near the city of Albany was purchased at the city of New York by one residing there, for the declared purpose of laying it out into building lots, and the vendor represented the surface of it to be even, requiring no grading, whereas he knew the fact to be otherwise, though the vendee did not, *held*, in an action on a bond given for the price, that the fraud was one of which the vendee could avail himself by way of recoupment. Van Epps v. Harrison, 5 Hill (N. Y.), 63.

[2] Vernol v. Vernol, 63 N. Y. 45.

[3] Leird v. Abernathy, 10 Heisk. (Tenn.) 626; Campbell v. Medbury, 5 Biss. (C. Ct.) 33; Tarlton v. Daily, 55 Tex. 92; Gibson v. Richart, 83 Ind. 313; Staley v. Ivory, 65 Mo. 74; Randlet v. Herren, 20 N. H. 102; McGehee v. Jones, 10 Ga. 133; Timmins v. Shannon, 19 Md. 315; Hunter v. Bradford, 3 Fla. 286; Edwards v.

when such paramount title has not been asserted;[1] nor by reason of inchoate interests or equitable rights existing in favor of others, which the vendee has not been called upon to extinguish or pay, and from which he has suffered no inconvenience.[2] The purchaser, in such event, is limited to his rights under the covenants of his deed;[3] and if he has neglected to protect himself by such covenants he is practically without remedy, on a subsequent failure of title, either at law or in equity.[4] This doctrine, while resting somewhat upon the theory that the purchaser's possession being under color of title, may continue undisturbed for twenty years, and thus become perfect and he be uninjured, or that, should injury result, he may rely upon the covenants of his deed for redress,[5] is founded more perhaps upon the broad and equitable principle that a purchaser ought not to be permitted to hold his deed and use and enjoy the property, and at the same time resist the payment of the purchase money.[6]

The fact remains, however, that the land and not the covenants of the deed forms the real consideration of the notes or other evidence of the deferred payments; and where a party, through fraudulent practices, has been induced to take a title which subsequently fails, this further fact would authorize the interference of equity and a cancellation of the contract, the other party being placed *in statu quo* either by reconveyance, a release of the covenants, or a surrender of the premises; for

Bodine, 26 Wend. (N. Y.) 114; Walsh v. Hall, 66 N. C. 233; Vining v. Leeman, 45 Ill. 246.

[1] Bramble v. Beidler, 38 Ark. 200; Purcell v. Heeney, 28 Ohio St. 39; Webster v. Laws, 89 N. C. 224; Laforge v. Matthews, 68 Ill. 328; Smith v. Hughes, 50 Wis. 620; Price v. Blount, 41 Tex. 472; Starkey v. Neese, 30 Ind. 222; Vining v. Leeman, 45 Ill. 246.

[2] Merritt v. Merle, 22 La. Ann. 257; Stelzer v. La Rose, 79 Ind. 435; Failing v. Osborne, 3 Oreg. 498; Peay v. Wright, 22 Ark. 205; Mitchell v. McMullen, 59 Mo. 258; Walker v. Wilson, 13 Wis. 525; Hill v. Butler, 6 Ohio St. 217; Hunter v. Bradford, 3 Fla. 286; McGehee v. Jones, 10 Ga. 133.

[3] Hughes v. McNider, 90 N. C. 248; Leird v. Abernathy, 10 Heisk. (Tenn.) 626.

[4] Laugherty v. McLean, 14 Ind. 108; Barkhamstead v. Case, 5 Conn. 530.

[5] Small v. Reeves, 14 Ind. 163; Beal v. Beal, 79 Ind. 280; Vining v. Leeman, 45 Ill. 246; Willetts v. Burgess, 34 Ill. 494.

[6] Sebrell v. Hughes, 72 Ind. 186; Vining v. Leeman, 45 Ill. 246; Buckles v. Northern Bank, 63 Ill. 268.

in such cases equity will not require the purchaser to pay the purchase money and rely for indemnity on covenants that may prove to be entirely worthless.[1] In no event, however, can the purchaser retain the benefit of the covenants and the possession of the property, and yet avoid the payment of the purchase money.[2] In an action on any obligation given in payment for land, the fact that the grantor's title is defective will be unavailing, therefore, unless fraud is suggested, or it is shown that the grantor is insolvent, or there has been an eviction under title paramount.[3]

It has been held that where a purchaser has gone into possession under a deed containing no covenants, he might successfully defend against an action for the unpaid purchase money by showing a defect in the grantor's title.[4] But such decisions are manifestly opposed to the current of authority and in direct contradiction of the rule that a purchaser, who neglects to obtain satisfactory assurances of the title he buys, takes it subject to all its defects and infirmities; and it is quite certain that a purchaser by quitclaim, who takes with notice of a defect, actual or constructive, does so at his peril, and cannot afterwards be heard to dispute the vendor's right to recover whatever balance may be due. A contemporaneous agreement by the vendor to rectify the defect, if made in writing, would doubtless enable the vendee to interpose the defense in case of eviction; but the mere continued existence of the defect, where the vendee's possession has not been disturbed, would constitute no bar to the action.[5]

Where a party takes an agreement for a deed of lands, with-

[1] Whitlock v. Denlinger, 59 Ill. 96. As where a vendee was induced to purchase by the fraudulent representation that a deed conveying a superior outstanding title was a forgery, and that the vendor was solvent and able to respond to the warranty. Norris v. Ennis, 60 Tex. 83.

[2] Vining v. Leeman, 45 Ill. 246; Laforge v. Matthews, 68 Ill. 328; Wimberg v. Schwegeman, 97 Ind. 528; Lett v. Brown, 56 Ala. 550; Staley v. Ivory, 65 Mo. 74.

[3] Guice v. Sellers, 43 Miss. 52; James v. Hays, 34 Ind. 272; Wimberg v. Schwegeman, 97 Ind. 528; Booth v. Saffold, 46 Ga. 178. In case of fraud and insolvency of the vendor the purchaser may successfully resist the payment of the cross-bill, setting forth specifically the defects, and charging the fraud and insolvency. Leird v. Abernathy, 10 Heisk. (Tenn.) 626.

[4] Cross v. Noble, 67 Pa. St. 74.

[5] James v. Hays, 34 Ind. 272; Condrey v. West, 11 Ill. 146.

out any guaranty as to title, and gives his promissory notes therefor, it has been held that, having got what he bargained for, he cannot set up failure of consideration, even though the title fails;[1] but if the purchase is under a contract which provides for a conveyance of title to the land upon payment of the notes given for the unpaid price, the true consideration of such notes is not the warranty deed to be made, but the title to the land with which the purchaser is to be invested. In such case, if the title fails, or cannot be given, the consideration fails.[2] Where the land has been sold under a contract, not requiring evidence of title, the burden is on the purchaser to show any defect of title.[3]

It is further to be observed that the presumption is that the grantee in a deed went into the possession of the land and has not been disturbed therein, and he must show the contrary in order to recover the consideration paid, or to defeat an action upon a promissory note given as part of such consideration.[4]

§ 3. **Continued — Executory contract.** A somewhat different rule prevails where the contract remains executory from that which applies where the purchaser, having accepted a deed for the land, has given his notes for the price and entered into actual or constructive possession. In such case, as has been shown in the preceding paragraph, the purchaser cannot resist the payment of the notes until evicted by a paramount title. But where a purchase is made under a bond or contract which provides for a conveyance of the title to the land upon payment of the notes given for the price, the true consideration for such notes is not the deed to be made, but the title to the land with which the purchaser is to be invested. If the title fails or cannot be given, the consideration fails, and the non-fulfillment of the conditions of the bond or agreement to make title will be a sufficient defense to a suit on the notes given for the purchase money.[5] To render this defense

[1] Condrey v. West, 11 Ill. 146.

[2] Thompson v. Shoemaker, 68 Ill. 256; and see Wamsley v. Hunter, 29 La. Ann. 628.

[3] Baxter v. Aubrey, 41 Mich. 13.

[4] Bardeen v. Markstrum, 64 Wis. 613.

[5] Davis v. McVickers, 11 Ill. 327; Clark v. Croft, 51 Ga., 368; Howard v. Kimball, 65 N. C. 175; Coburn v. Haley, 57 Me. 347; Harvey v. Morris, 63 Mo. 475; Thompson v. Shoemaker, 68 Ill. 250. In this case the vendor, a married woman, sold a tract of land, giving the purchaser a bond for a warranty deed on payment of

available however, the purchaser should, as a rule, be in position to demand performance by the vendor; for where a vendor sells land to be paid for in instalments, with covenants on his part to convey a good title, it might be no defense to an action brought to recover the first instalments before the last one became due, that the vendor has no title, for he has the whole time until the contract matures in which to obtain the same.[1] But where the purchaser has an election, on payment of the first instalment, to give security for the remaining instalments, and the vendor in such event is bound by the terms of the contract to execute a conveyance on the day fixed for the payment of the first instalment, then a tender of payment and security and defect of title on the part of the vendor would be a bar to a recovery.[2]

the notes given for the purchase money. The vendor sold and assigned these notes, and gave the assignee a quitclaim deed to the land as security for their payment. It appeared that the title was held by a trustee in trust for the use of the vendor during her natural life, and at her death for others. *Held*, on bill in chancery by the assignee against the purchaser to compel the payment of the notes, he having tendered a deed to the purchaser, that the complainant was not entitled to a decree for the payment of the purchase money, because he had not the ability to comply with the terms of the bond and convey the title in fee to the purchaser. So where, in a contract in writing for the sale of a farm, it was stipulated that a part of the purchase money should be paid when the deed was ready, and the residue in annual instalments, it was held that the vendor could not claim payment of any part of the purchase money until he had tendered to the vendee an unincumbered title to the farm, and that it was not sufficient to tender a warranty deed, the farm being subject to a mortgage then due. Swan v. Drury, 22 Pick. (Mass.) 485.

[1] Runkle v. Johnson, 30 Ill. 328; Monson v. Stevens, 56 Ill. 335; Harrington v. Higgins, 17 Wend. (N. Y.) 376. It has been held that where the agreement was to convey with warranty upon the payment of the last instalment, while it would be a good defense to an action brought for the purchase money, after all the instalments were due, that the vendor did not have title, it would, notwithstanding, be a good answer to this defense for the vendor to show that while he does not hold the title he controls it so that he can comply with his agreement. Runkle v. Johnson, 30 Ill. 328. It will be remembered, however, that where a party agrees to convey to another by warranty deed a tract of land, the legal title to which is in a third person, the procuring of the conveyance of the land by such third person with his warranty will not answer its requirement; the party who was to receive the deed is entitled to have the personal covenants of him who agreed to convey as a further security for his title. Crabtree v. Sevings, 53 Ill. 526.

[2] Harrington v. Higgins, 17 Wend. (N. Y.) 376.

It does not seem, however, that a mere misdescription of the courses of the boundary lines in a deed by which the vendor claims title will justify a purchaser in refusing to accept a deed, if the monuments referred to so clearly identify the land that the courses may be rejected as erroneous, or where the vendor or his grantor has been in the exclusive possession of the land for more than twenty years;[1] nor will the fact that a mortgage is then outstanding against the property justify the purchaser in refusing to accept a deed, if the vendor is able and willing to have it discharged.[2] At the same time it is the duty of the vendor, who has contracted to convey by an unincumbered title, to remove all incumbrances which existed when the contract was entered into as well as those subsequently imposed by him; and until he has discharged this duty he cannot compel the payment of the purchase money.[3]

The matter of possession, however, is the same whether the contract be executed or executory; and should the vendee have gone into possession under the contract he cannot retain the same and yet avoid payment of the balance of the purchase money on the ground that the vendor cannot give him the title as agreed.[4] To avail himself of such defense he must offer to rescind the contract, whereupon he will be relieved from the duty of further payment, and may recover not only whatever he may have paid, but also the value of his improvements, less the value of his use and occupation. Where the vendor is insolvent or unable to respond in damages, this has been held to modify the rule, but usually it is applied as stated.

§ 4. **Deficiency in quantity.** Usually, where there is no statement of quantity, the land being described only by metes and bounds, and no warranty, either of the quantity of land conveyed or of the correctness of the lines as described, and the transaction has been entirely closed by the execution, delivery and acceptance of a deed for the prop-

[1] Galvin v. Collins, 128 Mass. 525.

[2] Galvin v. Collins, 128 Mass. 525. And it has been held that, in an action for a breach of contract of purchase of land to be conveyed free from incumbrances, a purchaser who has absolutely refused to accept any deed thereof cannot avail himself of any defect in the deed tendered, or of the fact that a mortgage upon the land was not discharged. Wells v. Day, 124 Mass. 38.

[3] Cooper v. Singleton, 19 Tex. 260; Thompson v. Christian, 28 Ala. 399.

[4] Wyatt v. Garlington, 56 Ala. 576.

erty, payment of the purchase money or any part thereof, and there is nothing to show that any fraud or deceit has been practiced in regard to the width or length of the land, the purchaser having had opportunities as good as the vendor to ascertain the actual distances, and there afterwards turns out to be a small deficiency, the matter will be regarded as a mutual mistake; yet as both parties presumably had equal opportunities of correcting the same prior to closing the transaction, and neither having availed himself of such opportunities, neither will be permitted to open the contract or resort to the other for redress.[1] Nor is there any material difference in the rule where quantity has been stated, but merely as an addenda to another and more specific description. Mere enumeration of quantity at the end of a particular description of the premises, where there has been no fraud nor gross mistake, has ever been regarded as matter of description only, and not of the essence of the contract;[2] and in such cases the purchaser is not entitled to an abatement of price because, on survey, the tract is found to contain a less number of acres than that specified.[3] Land conveyed by metes and bounds, or other equally definite description, and of estimated quantity, for a given sum, imports a sale in gross; and where a tract is sold as a whole or in gross, and not as a specified quantity, or by the acre, the parties as a rule are not entitled to any relief, either for an excess or deficiency which may subsequently be discovered in the quantity of the land.[4]

But the cases in which the foregoing doctrine has been held proceed upon the ground that the first or particular descrip-

[1] Farmers' Bank v. Galbraith, 10 Pa. St. 490; Canal Co. v. Emmett, 9 Paige (N. Y.), 168; Stebbins v. Eddy, 4 Mason (C. Ct.), 414.

[2] Melick v. Dayton, 34 N. J. Eq. 245; Harrell v. Hill, 19 Ark. 102; Mann v. Pearson, 2 Johns. (N. Y.) 37.

[3] King v. Brown, 54 Ind. 368; Melick v. Dayton, 34 N. J. Eq. 245; Crislip v. Cain, 19 W. Va. 438; Allen v. Shriver, 81 Va. 174.

[4] Rich v. Fergusen, 45 Tex. 396; Gillidan v. Hinkle, 8 W. Va. 262; Kerr v. Kuykendall, 44 Miss. 137; Caldwell v. Craig, 21 Gratt. (Va.) 132; Marvin v. Bennett, 26 Wend. (N. Y.) 169; Perkins v. Webster, 2 N. H. 287; Tyson v. Hardesty, 29 Md. 309. It has been held that false representations as to quantity of land conveyed by a deed for a specified number of acres, "more or less," form no defense to an action for purchase money, unless they were made fraudulently and with intent to deceive the purchaser. Josselyn v. Edwards, 57 Ind. 212.

tion by boundaries, or by plat, or even by designation, was complete and definite, so as to make it apparent that the tract was sold by the prescribed limits and not by the number of acres it might contain, and that the purchaser has the distinct thing for which he contracted. Where, however, there is not a sufficient certainty and demonstration of the land granted expressed in the other terms of description the number of acres becomes essential; and, in such event, if the essential terms cannot be satisfied there is such a failure of consideration as will entitle the vendee to an abatement of the stipulated price.[1] So, too, where land has been sold by estimated quantity, if such estimation has been the result of mistake, caused by erroneous measurements or otherwise, and the purchase price was based upon the supposed acreage, such mistake may be shown, and the vendee will be entitled to compensation for the deficiency, or when sued for the purchase money may claim compensation by way of abatement from it.[2] The reason for this is that each party is supposed to be regulated in his bargain by the real quantity, and if there is any mistake as to the real quantity the one has more and the other less than what both intended, either in land or price. In such cases the quantity conveyed constitutes an essential ingredient of the contract, and is not mere matter of description. Equity will therefore correct the mistake, and put the parties in the situation in which they would have been if the real facts had been known to them.[3] The deficiency must also be material, amounting to what is usually termed a gross mistake; that is, the difference between the actual and the estimated quantity of land represented must be so great as to clearly warrant the conclusion

[1] Kirkland v. Way, 3 Rich. L. (S. C.) 4; Mingle v. Smith, 1 Ala. 415.

[2] Jenks v. Fritz, 7 W. & S. (Pa.) 201; Terrell v. Kirksey, 14 Ala. 209; Melick v. Dayton, 34 N. J. Eq. 245; Hosleton v. Dickinson, 51 Iowa, 244.

[3] Stebbins v. Eddy, 4 Mason (C. Ct.), 416. The rule applied in a case where the vendor had represented a tract of one hundred and fifty-seven acres to be one hundred and eighty-seven acres, and the purchaser had given back a mortgage for a balance of the purchase money less than the value of the deficiency; and *held*, that the purchaser was entitled to an abatement of the purchase money for the deficiency, although the vendor alleged that the only mistake was in her conveyancer's omission to comply with her direction to insert the words "more or less." Mendenhall v. Steckell, 47 Md. 453.

that the parties would not have contracted had they known the truth.[1] If, on the other hand, the deficiency is so slight that it makes no difference in the value of the land, and it is apparent that even if it had been known there would have been no difference in the price, it is immaterial and furnishes no ground for compensation.[2]

In all cases, therefore, where the contract is not for the sale of a specific quantity of land, but for a specific tract or a designated lot or parcel, by name or description, for a gross sum, and the transaction has been had in good faith, a mutual mistake as to the quantity, but not as to the boundaries, will not entitle the purchaser to relief.[3] He will be entitled to the quantity contained within the designated boundaries of the grant, be it more or less, without reference to quantity or measure;[4] while the acceptance of a deed and the payment of the purchase money, or the execution of notes or bonds for the deferred payments of the same, closes the question upon the agreement, which is regarded as merged into the conveyance, which thereafter remains as the sole memorial and exposition of the contract. Both parties are thereafter precluded from claiming either on the one side an allowance for deficiency or on the other payment for a surplus. The making and delivery of the deed are regarded as the consummation of the purchase, after which the parties have no recourse to each other except for imposition or fraud.[5] On the other hand, where the quantity is a controlling inducement, and the parcel is sold with special reference to acreage or frontage, and the price is fixed by the supposed area or extent, if it subsequently appears that the parcel is deficient, and such deficiency is a material part of

[1] Melick v. Dayton, 34 N. J. Eq. 245; Brooks v. Riding, 46 Ind. 15.

[2] Winston v. Browning, 61 Ala. 80.

[3] Fredrick v. Youngblood, 19 Ala. 680; Morris v. Emmett, 9 Paige (N. N.), 168; Noble v. Googins, 99 Mass. 231; Pickman v. Trinity Church, 123 Mass. 1.

[4] Morris v. Emmett, 9 Paige (N. Y.), 168.

[5] Farmers' Bank v. Galbraith, 10 Pa. St. 490; Coughenour's Adm'r v. Stauft, 77 Pa. St. 191; Fredrick v. Youngblood, 19 Ala. 680; Williams v. Halloway, 19 Pick. (Mass.) 387; Mann v. Pearson, 2 Johns. (N. Y.) 37; Ketchum v. Stout, 20 Ohio, 453; Weart v. Rose, 16 N. J. Eq. 290; Bryan v. Hitchcock, 43 Mo. 527; Roseman v. Canovan, 43 Cal. 110; and see 4 Kent's Com. 466; 1 Story, Eq. Jur. § 141; 3 Wash. Real Prop. *630.

the tract intended to be conveyed, in an action for the purchase the vendee may defend, at least as to so much of the purchase money price as was agreed to be paid for the part found to be wanting.[1]

§ 5. **Defective quality.** Ordinarily the purchaser of real estate takes the risk of quality as well as title; and if he has personally examined the land, or, having had reasonable opportunities so to do, has neglected to make a proper examination, unless there has been a wilful misrepresentation involving moral turpitude and fraud, he cannot defend against an action brought for the recovery of the purchase money on the ground that the condition or quality of the property is not commensurate with the price demanded, nor set off or recoup the value of the difference. Representations made at the time of sale, even though false and made with the intent of inducing purchase, unless they are clearly shown to be guaranties, will not usually suffice to alter or change the effect of the rule.

But where the vendor has given a positive guaranty of the condition and quality of the property and upon which the vendee acted, and which controlled such action in making the purchase, and it afterwards turns out that the statements and representations are false, notwithstanding the contract is in writing and the guaranty rests only in parol, yet as the oral undertaking was material to the subject-matter and induced the purchaser to enter into the contract, it would seem that this would constitute the practice of such a fraud upon the purchaser as to subject the writing to explanation or qualification by parol. In such a case, therefore, the damages sustained by reason of the breach of the guaranty might be set off against the purchase money due, and the measure of such damage would be the value of the deficiency of quality.[2]

[1] So held in a case where the vendor, to induce the vendee to purchase, represented to him that the land in question was the ground inclosed by a certain fence, which ground was examined by the vendee and had long been known to him; that the lot had a frontage of a certain number of feet on a street; when the fact, unknown to the vendor and vendee, was that the fence inclosed five feet in width of a street, and as many feet less than the frontage so represented by the vendor. Brooks v. Riding, 46 Ind. 15.

[2] As where, in the case of the sale of a saw-mill of guarantied power and capacity, which subsequently proves to be of less capacity than as guarantied, the measure of damages

§ 6. **Personal disability.** Legal incapacity to contract may be and often is a good defense to an action for the purchase money. Thus, a contract with an infant, while not void, is nevertheless voidable at his election when he becomes of age. Until that time no action will lie; but after attaining majority he may relinquish the property and claim a repayment of any moneys advanced on the purchase, as well as disclaim any further liability for such as remains unpaid.[1] But he cannot affirm the purchase and still plead his infancy to avoid payment of the purchase money;[2] nor can he continue to use and enjoy the property or make contracts in respect thereto and yet avoid any obligations incurred in its purchase, for by such acts he affirms the contract and makes himself liable for the payment of the residue of the purchase money.[3]

§ 7. **Unconscionable bargains.** There are many cases where a purchaser may either defend an action for the purchase money or obtain relief against it in equity on the ground that the contract, while perhaps not fraudulent in a strict legal sense, is nevertheless oppressive and unconscionable, and inconsistent with the principles of equity as well as of sound morality. Such cases frequently occur where the owners of land, by exhibiting maps of contemplated town plats, with statements of elaborate and substantial improvements to be made, thereby induce purchasers to buy lots at grossly exaggerated and wholly unconscionable prices. Where upon such exhibition of such maps or plats statements are made, either upon the maps or in connection therewith, respecting the character of the improvements to be made for the purpose of enhancing the value of the lots sold, and such owners, in order to induce the vendor to make the purchase, promise and assure him that such improvements shall be made, and the vendee relying upon such promises and assurances pays part of the purchase money for the lots, and such owners afterward

to be set off was held to be the difference between the customary value of the earnings of the mill as warranted and that received, taking into consideration the wear and tear, and the expenses of maintaining it. Walker v. France, 112 Pa. St. 203.

[1] Lynde v. Budd, 2 Paige (N. Y.), 191.

[2] Henry v. Root, 33 N. Y. 553; Kline v. Beebe, 6 Conn. 494.

[3] Lynde v. Budd, 2 Paige (N. Y.), 191; Boody v. McKenney, 23 Me. 517; Callis v. Day, 38 Wis. 647.

abandon the undertaking or fail and neglect to make any of the promised improvements, whereby the value of the lots purchased by the vendee are reduced in value to a sum greatly below the purchase price agreed to be paid, such vendor will clearly be entitled to relief against the payment of the residue of the purchase money, and may successfully defend an action brought upon a mortgage obligation given therefor.[1]

The principle upon which this doctrine seems to rest is that the vendors, by abandoning their undertaking or by failing to make the contemplated improvements within a reasonable time, thereby virtually release the vendee from his obligation; and where it appears that he has already paid all that the land is worth he will be entitled to have his remaining indebtedness canceled. In matters of this kind the case is not usually one of original fraud, or at least is seldom susceptible of proof as such, as the mania for speculation is so prevalent and widespread and opportunities for indulgence in the same so abundant that towns and cities are often projected in perfect good faith, and lots therein sold with the firm belief that the enterprise will bring large returns to every investor. Subsequent events may so change matters that it is not for the interest of the promoters to lay out or improve the contemplated towns, or make erections or other matters in conformity with the promises which they had held out to purchasers to induce them to pay extravagant prices for town lots. In such case the questions raised present many difficulties in solution; yet the principle may be considered as established that it would be unconscionable and unjust for the vendee to be then compelled to pay the residue of the purchase price after he had already paid a sum equal to or in excess of the value of the property if the contemplated improvements should not be made.

§ 8. **Agreements to forbear.** Undoubtedly if subsequent to conveyance an agreement is made between the parties whereby, for a valuable consideration, the vendor is to grant an extension of the time of payment, such agreement would be binding on the vendor and available by the vendee as a defense in an action instituted to recover the purchase money.

[1] Rogers v. Salmon, 8 Paige (N. Y.), 559; Donelson v. Weakley, 3 Yerg. (Tenn.) 178.

But to be effectual such an agreement must strictly conform to legal rules. Thus where, after an absolute sale and the execution and delivery of a deed, the vendee set up as a defense to a suit instituted upon the notes a new and distinct agreement to forbear the enforcement of the collection of the purchase money for ten years, upon condition that the vendee during that time should erect a house upon the premises worth a certain sum, it was held that the erection of such a building was not a legal consideration to give any binding effect to a promise from the vendor.[1]

§ 9. **Agreements to rescind.** The rule seems to be well settled that an executory contract in writing, not under seal, may before breach be varied by parol, either by enlarging the time, changing the mode of payment, or by putting an end to it altogether.[2] On the other hand, it is still a generally received doctrine that a sealed instrument cannot be varied or abrogated by another agreement, unless the latter is also sealed, although the tendency of modern decisions is to give validity to parol agreements to rescind a sealed contract when founded on a new consideration, and thus to abolish the distinction between sealed and unsealed instruments.[3] This latter rule, however, is further subject to many modifications and apparent exceptions. If the contract varying the terms of or abrogating the specialty has been performed, so that the obligor has received the full benefit of the change, or if the obligor has occasioned the breach, or has put it out of his power or that of the obligee to perform, he will not be permitted to avail himself of the default of the other party.[4]

Questions arising out of the foregoing rules become important in many instances where actions are brought to enforce payment of the purchase money, and resisted on the ground that there has been a rescission of the contract, and the only evidence of such rescission rests in parol. Ordinarily an unexecuted parol agreement to rescind, if founded on no new

[1] Hogan v. Crawford, 31 Tex. 633.

[2] Keating v. Price, 1 Johns. Ch. (N. Y.) 22; Low v. Treadwell, 12 Me. 441; Cummings v. Arnold, 3 Met. (Mass.) 486.

[3] Stevens v. Cooper, 1 John. Ch. (N. Y.) 430.

[4] Dickinson v. Cone, 6 Ind. 128; Lattimore v. Harsen, 14 Johns. (N. Y.) 330; Dearborn v. Cross, 7 Cow. (N. Y.) 48.

consideration, cannot be enforced, although if executed courts will not inquire into the consideration nor disturb the condition in which the parties have voluntarily placed themselves. A present indebtedness can in general only be discharged by payment, accord and satisfaction, or release under seal; yet when a contract of sale is actually rescinded, the restoration and acceptance of the property should be held to satisfy the obligation of the purchase. If the vendor agrees to take back what he has sold and cancel the debt, it is an accord; and if he actually takes it back, it is a satisfaction. There is a broad distinction made, however, between an executed and an unexecuted agreement. In the former case, if the contract be actually canceled and the property surrendered, it is at an end, and the formality of a release is unnecessary; and the effect of such executed agreement is the same whether the contract be sealed or otherwise. The obligation, though it has become a subsisting debt, is discharged by the acts rather than the agreement of the parties. In the latter event, a verbal agreement merely to rescind, without new consideration, and not followed by any action of either party in relation to the land or the writing, would be no defense to an action brought upon the contract, and the contract would be treated as valid in a suit by the vendor for the stipulated purchase money.[1]

§ 10. Purchaser may defend with cross-action pending. A party injured by the breach of an express warranty on the sale of land may defend against the recovery of unpaid purchase money and at the same time maintain his cross-action against the wrong-doer to recover damages on the original contract. Under such circumstances, if the injured party seeks consequential damages, his action therefor is no bar to his defense against payment of the original consideration.[2]

[1] Pratt v. Morrow, 45 Mo. 404; Russell v. Berkstresser, 77 Mo. 425.

[2] As where defendant purchased a house, and in part payment therefor gave his note for $250, which was indorsed over to and sued by plaintiff. Defendant resisted payment, claiming an entire failure of consideration by reason of the house being defective and not equal to his vendor's warranty, and that plaintiff took the note with full knowledge of such failure of consideration. The evidence showed that the gable-wall of the house at the time of defendant's purchase was defective and unsafe, and that defendant was obliged, in consequence, to tear it down and rebuild it; that his vendor fraudulently represented the wall to be solid and

§ 11. **Set-off.** According to the received definitions, set-off consists of a demand which a defendant makes against the plaintiff in the suit for the purpose of liquidating the whole or a part of his claim.[1] It is a proceeding which seems to have been unknown at common law, where mutual debts were regarded as distinct and inextinguishable except by actual payment or release, and is regulated by statute both in England and the United States. At law it is confined to mutual debts

safe, upon the faith of which representations defendant was induced to buy. It also appeared that defendant had sued the vendor to recover damages on account of same. It was contended that the defendant could not, in an action to recover the purchase money, set up as a defense the defective condition of the wall and at the same time sue his vendor for damages alleged to have been sustained by reason of his misrepresentations in regard to the wall. *Held*, that as the proof showed that defendant had paid the entire purchase money, except the $250 in suit, and in addition thereto had expended large sums in rebuilding the wall, he had the right not only to sue his vendor to recover damages which he sustained by reason of said vendor's misrepresentations, but also to set up the defective and unsafe condition of the wall as a defense to the suit brought on the note to recover the balance of the purchase money. Applegarth v. Robertson, 65 Md. 493. The court in the foregoing case bases its decision largely upon the rule laid down in Mendel v. Steel, 8 Mees. & W. (Eng.) 858, which was an action brought by the buyer to recover damages for breach of express warranty in the quality of a ship built under a written contract. The defendant pleaded that the buyer had already recovered damages by setting up the breach of warranty in a suit brought by the defendant to recover the price of the ship, and this plea was held bad on demurrer. Baron Parke said:

"It must, however, be considered that in these cases of goods sold and delivered with warranty, and work and labor, as well as the case of goods agreed to be supplied according to a contract, the rule which has been found so convenient is established; and it is competent for the defendant in all these not to set off by a proceeding in the nature of a cross-action, but simply to defend himself by showing how much less the subject-matter of the action was worth by reason of the breach of contract; and to the extent that he obtains or is capable of obtaining an abatement of price on that account he must be considered as having received satisfaction for the breach of contract, and is precluded from recovering to that extent in another action, but no more."

This, Mr. Benjamin says, is the leading case now always cited for establishing — *first*, that the buyer may set up the defective quality of the warranted article in diminution of price; and *secondly*, that he must bring a cross-action if he desires to claim special or consequential damages, which action is not barred by reason of his having attained a diminution of price in a previous action. Benj. Sales, 893.

[1] 2 Bouv. Law Dict. 515.

of a liquidated and certain character, and takes place only in actions on contracts for the payment of money.[1]

Set-off in equity is allowed upon the same general principles as at law; and upon a bill to foreclose a mortgage or to obtain satisfaction of the amount due from the defendant, the latter may offset a debt due to him from the complainant which would be a proper subject of offset in a suit brought by the complainant at law to recover the amount due upon his mortgage.[2] There must, of course, be mutuality in the demands, and the amounts should be liquidated and certain. The debt to be set off must be actually due at the commencement of the suit, although it seems that set-off will be allowed to the amount claimed in the mortgage when such amount claimed in liquidation arises from transactions subsequent to the mortgage. While the practice in equity may be more liberal than at law in respect to mutual credits, yet set-off can no more be allowed in equity than at law in cases of demands for uncertain and unliquidated damages.[3] It would seem, however, that the mere existence of cross-demands will not be sufficient to justify a set-off in equity, and that it is only when the party seeking the benefit of it can show some equitable ground for being protected against his adversary's demand that it will be allowed.[4]

§ 12. Assignees of the purchase money. The rule is fundamental and beyond dispute that a party who, before maturity, purchases a written obligation for the payment of money, negotiable in character, without notice of any equities outstanding in the obligor or existing between the original parties to the transaction, will be protected in such purchase where the same was made in good faith and for value. The rule is general and applies to all classes of transactions. Yet where a vendor agrees to remove all existing incumbrances upon the premises sold, a failure to do so will constitute a defense in equity against the notes given for the purchase money to the extent

[1] See "Recoupment," *infra*, ch. XXXV, § 22.

[2] Bathgate v. Haskin, 59 N. Y. 537; Gafford v. Proskauer, 59 Ala. 267; Chapman v. Robertson, 6 Paige (N. Y.), 627.

[3] Smith v. Gas Co. 31 Md. 12; Jennings v. Webster, 8 Paige (N. Y.), 503.

[4] See 2 Story's Eq. Jur. § 1436.

of the incumbrance; and such defense will be good even against an assignee of the notes before maturity, he having notice thereof when he received them.[1] So, too, when a purchaser of land, upon taking a bond for title, gives in payment therefor a note expressing on its face that it is so given, the note itself will be notice of the purchaser's equity in case the title of the land shall prove defective; and an assignee or holder of the note cannot, in case of such defect in the title, recover on the note, though he took it before it became due.[2]

§ 13. **Where vendor repossesses himself of the land.** The fact that the vendee has never had possession of the property is immaterial where the vendor is willing and offers to convey on payment of the purchase price; but in some states, where by the prevailing practice the vendee's equitable estate may be taken on execution or sold under a decree in equity, some peculiar and perplexing questions have arisen with respect to the rights of the parties in regard to the property under such sales, where the vendor has been the bidder and again clothed himself with all the *indicia* of ownership in respect thereto. It is a question upon which there appears to be some doubt as to whether a vendor under an executory contract, after repossessing himself of the equitable estate of the vendee, can enforce payment of the balance of the purchase money. The equitable doctrine of the relation of the parties under an ordinary contract of sale, as has been shown in preceding chapters of this work, makes the vendor a trustee of the legal title for the vendee, who may obtain the same only by paying the purchase money or performing the conditions according to the tenor of the contract. The right to acquire the legal title on whatever terms may be imposed constitutes the vendee's equitable interest in the land, which, increasing with each payment of purchase money, finally ripens into a perfect legal estate. If the vendee fails to pay, and the vendor, taking advantage of legal remedies, recovers judgment against him, and under such judgment procures a sale of the vendee's interest, which he himself purchases, it is contended that the relation of trustee and *cestui que trust* is destroyed, and the equitable reunited to the legal estate — that, nothing being left in the

[1] Tenney v. Hemenway, 53 Ill. 97. [2] Howard v. Kimball, 65 N. C. 175.

vendee, there is nothing for which he should pay. The contract in such a case was mutual when made, and the vendee was to have the land in consideration of his payments; but after a sale as just described, his equitable right to demand a deed conveying the land in exchange for his money would be gone, and if his liability to pay should remain it would be a liability that survived the mutuality of the contract. The vendor would not be obliged to convey though the vendee should pay the purchase money in full. When the mutuality of a contract has been destroyed, the contract itself, by the rules of law, ceases to exist.

It is manifestly unjust that a vendor should recover to himself both the land and the purchase money. It forms no part of the ordinary contract, and is opposed to well-established rules of law; while a reasonable and just doctrine would be that when the vendor takes the land he gives up the purchase money, just as he would be compelled to give up the land upon taking the purchase money.[1]

In most of the states the vendee's equity may be foreclosed in a proper action, while in others a declaration of forfeiture is sufficient to debar him from further rights in land under the contract, but usually such equity cannot be taken or sold under an execution issued on a judgment; and it has been held that a vendor who has given his bond to make title and receive part of the consideration must execute and record his deed before he can levy on and sell the land for the balance of the purchase money.[2]

The mere fact of recovery of possession, however, where the contract is still executory, does not in any way affect the rights of the parties with regard to subsequent performance. Unless

[1] In Graff's Executors v. Kelly's Executors, 43 Pa. St. 453, the vendor sold, by articles of agreement, one hundred acres of land in consideration of $530, which the vendee covenanted to pay in annual instalments. Having failed to make the first payment, suit was brought against the vendee and a judgment recovered therefor, and the land sold, the vendor becoming the purchaser. Subsequently the vendor brought an action for the balance of the purchase money, and the defense was that the sheriff's sale of the premises for the first instalment of purchase money extinguished the covenant on which the suit was founded. The court was of the same opinion, and sustained the defense. And see Bowser's Appeal, 101 Pa. St. 470.

[2] Heyward v. Finney, 63 Ga. 353.

the contract so stipulates the vendee has no claim for the same, and usually will not be permitted to assert possessory rights as against his vendor. The fact that the vendor has regained possession of the premises in an action of forcible detainer does not preclude the vendee from the fulfillment of the contract on his part or from suing for a specific performance; and so, on the other hand, it does not preclude the vendor from bringing an action on the deferred payments or from recovering on a note given for the purchase money.[1]

§ 14. Relief by way of injunction. The prohibitory writ of injunction is frequently resorted to by one of the parties to a sale to restrain the other from doing some act which may be deemed inequitable or unjust in view of the circumstances, and may be employed to prevent a transfer of the notes or other evidences of indebtedness given for the purchase money, or, on the other hand, to restrain the transfer of the title to the property. It is necessary to the obtaining an injunction, as in other cases of equitable relief, that there should be no plain, adequate and complete remedy at law; and, while the rights of the parties still remain undetermined, it will only issue in cases where material and irreparable injury will otherwise follow. It is a remedy that may, in a proper case, be employed by the vendee where the vendor has brought an action at law for the purchase price, or to restrain the transfer of a note given for the price, to the end that the vendee may be enabled to plead a failure of title or consideration as a whole or partial defense to the note.[2]

To induce equitable interference to restrain the collection of the notes given for the purchase money of lands by one in undisturbed possession under the contract requires a very strong case. There must be fraud to mislead the party, or there must be insolvency in the vendor and clear evidence of unquestioned paramount title outstanding elsewhere which will be enforced, or the complainant must show non-residence of the vendor, or something which has been discovered since the contract, of

[1] Babcock v. Hamende, 3 Ill. App. 426.

[2] McDunn v. Des Moines, 34 Iowa, 467; Spurr v. Benedict, 99 Mass. 463; Younge v. McCormick, 6 Fla. 368; Ingram v. Morgan, 4 Humph. (Tenn.) 66; Nelson v. Owen, 3 Ired. (N. C.) 175; Galloway v. Finley, 12 Pet. (U. S.) 264.

equal dignity and analogous, which will show that it would be inequitable to enforce the same.[1]

The rule of the English court of chancery, and that which in some degree prevails almost universally where the doctrines of chancery are recognized, provides that where a purchaser has obtained a deed he can have no redress in equity, but must look to his covenants; and if he has but a covenant of general warranty he can have no redress until eviction. But this rule has been made the subject of broad exceptions in some states, and it has been held that equity may enjoin the collection of the purchase money of land on the ground of defect of title, even after the vendee has taken possession under a conveyance with covenants, if the title is questioned by suit, either prosecuted or threatened; or if the purchaser can clearly show that the title is defective.[2] In every case, however, the equities must be very strong to support such an action, and the bill must clearly allege the grounds upon which such pending or threatened suit is based, which must be such as would put a reasonable man in just apprehension of the loss of his land.[3] The jurisdiction thus exercised is said to result from what may be called the preventive justice of equity. It arrests the compulsive payment of the purchase money when the purchaser can show that there is either a certainty or strong probability that he must lose that for which he is paying his money. It gives him the relief, too, though his demand may be in the nature of unliquidated damages, because he has no other means of ascertaining them.

The foregoing principles seem to have been applied only in case of deed with warranty, but without other covenants; and because while the purchaser may be able to show that the title is bad, yet, as he has not been evicted, he cannot maintain an action at law on the covenant or ascertain his damages before a legal tribunal to have them set off against the vendor's demand. Where full covenants are inserted in the deed, and a

[1] McCauley v. Moses, 43 Ga. 577.

[2] Koger v. Kane's Adm'r, 5 Leigh (Va.), 606; Heavner v. Morgan, 30 W. Va. 335.

[3] The mere fact that some one has asserted a claim to the land, and that fact is generally known in the community where the land is situated, is insufficient to justify a court of equity in issuing a restraining order. Kinports v. Rawson, 29 W. Va. 487.

recovery may be had for a breach of the covenants of seizin against incumbrances, etc., and upon which the validity of the title may be vested and the damages of the party ascertained, it is doubtful whether relief could also be had in equity.[1]

The general rule would seem to be that, where the purchaser is in actual possession under a conveyance with covenants of warranty, he is not entitled to an injunction to restrain the collection of the purchase money merely on the ground of a failure of consideration resulting from a failure or defect of title. Actual eviction is, in such cases, regarded as an indispensable ingredient of the purchaser's claim to relief in equity, and when he still remains in possession under covenants of warranty no injunction will be granted.[2] Nor will a bill for an injunction lie where the vendee, by long and uninterrupted enjoyment, may have title by adverse possession.[3] In all such cases the purchaser must seek his remedy upon the covenants of his deed. Where, however, the purchaser can show fraud or misrepresentation, there may be relief in equity by arresting the payment of the purchase money or a part thereof; and it has been held that the suppression by the vendor of a knowledge of fatal defects in the title of the property conveyed, or other similar circumstances, constitutes such fraud as will authorize the interference of equity to prevent the collection of the purchase money, particularly where it appears that the vendor is insolvent and that a judgment against him upon the covenants would be unavailing.[4] Where the vendor fraudu-

[1] See Lovell v. Chilton, 2 W. Va. 410; Koger v. Kane's Adm'r, 5 Leigh (Va.), 606. The rule is the same where there are no covenants and where land has been sold and conveyed without warranty, or by a deed of a married woman whose warranty is void, under the mistaken belief that the grantor has a title, the real fact being unknown to both parties; and where each had equal means of information, and there is no fraud, and the title fails, the grantee can have no relief in equity. It is strictly *damnum absque injuria*. Botsford v. Wilson, 75 Ill. 132.

[2] See Harding v. Loan Co. 84 Ill. 251; Gayle v. Fattle, 14 Md. 69; Elliot v. Thompson, 4 Humph. (Tenn.) 99; Bumpus v. Platner, 1 Johns. Ch. (N. Y.) 213; Peters v. Bowman, 8 Otto (U. S.), 56; Campbell v. Medbury, 5 Biss. (C. Ct.) 33; Simpson v. Hawkins, 1 Dana (Ky.), 305; Edwards v. Morris, 1 Ohio, 532.

[3] Amick v. Bowyer, 3 W. Va. 7.

[4] Ingram v. Morgan, 4 Humph. (Tenn.) 65; Ralston v. Miller, 3 Rand. (Va.) 44; Simpson v. Hawkins, 1 Dana (Ky.), 278.

lently represents that he has a good and perfect title to the land sold, and the vendee, relying on such representations, is induced to purchase, the collection of the purchase money may be enjoined until the title shall have been made good as represented.[1] In such a case the action is based on the fraud and not on the covenants in the deed.

In general, in the absence of any showing of fraud, a purchaser in possession under an executory contract with a solvent vendor cannot enjoin a recovery of the purchase money merely because the vendor's title is defective.[2]

[1] Hinkle v. Margerum, 50 Ind. 240. A vendor who has guarantied a good title to the property he has sold cannot collect the price of the sale from the vendee until he has made the title good. Wamsley v. Hunter, 29 La. Ann. 628.

[2] Blanks v. Walker, 54 Ala. 117.

Art. III. Vendee's Action to Recover Back Price.

§ 1. When the action lies.
2. Failure of consideration — Defective title.
3. Incumbrances.
4. Erroneous deed.
5. Waste and spoliation.
§ 6. Voluntary rescission.
7. Vendor's inability to perform.
8. Vendee's refusal to perform.
9. Recovery of the deposit.
10. Vendee under quitclaim deed.

§ 1. When the action lies. Analogous to the action brought by the vendor to recover the purchase price of the land sold is that which may, under certain circumstances, be brought by the vendee to recover back the purchase money paid by him in case of a rescission. This action may be maintained (1) where the contract has been rescinded by mutual consent and agreement of the parties, and there has been no default on either side; (2) where the vendor is unable or unwilling to perform the contract on his part; (3) where the vendor has been guilty of fraud in making the contract; (4) where, by the terms of the contract, it is left in the purchaser's power to rescind it by any act on his part, and he does so; and (5) where neither party is ready to complete the contract at the stipulated time, but each is in default.[1]

In all cases where the purchaser has advanced the stipulated price, and the vendor on demand refuses to give such a conveyance as the contract requires,[2] or where, after part of the purchase money has been paid and before the next instalment has become due, the vendor conveys the land to a third party,[3] the purchaser may sue at once and recover whatever has been paid. So where, by a mutual mistake, the purchaser fails to get any title to the land which he has paid for, a court of equity will compel the vendor to repay the money to the purchaser.[4]

§ 2. Failure of consideration — Defective title. It was a rule of the civil law that the vendor of either real or personal property was obliged to inform the purchaser of all defects of

[1] Baston v. Clifford, 68 Ill. 67; Bryson v. Crawford, 68 Ill. 362; Gillett v. Maynard, 5 Johns. (N. Y.) 85; Wilhelm v. Fimple, 31 Iowa, 131; Beaman v. Simmons, 76 N. C. 43.

[2] Redington v. Henry, 48 N. H. 273.

[3] Eaton v. Redick, 1 Neb. 305.

[4] Frazier v. Tubb, 2 Heisk. (Tenn.) 662.

the subject of the contract, and was responsible to him for any latent defect, though not known at the time of sale. This rule, whatever may be thought of its propriety, was never incorporated into the common law, and has never obtained in the United States; and, if there be neither a warranty nor deceit, the purchaser buys at his peril. It is required of the parties in their dealings with each other that they exercise the utmost good faith; but beyond this our law has adopted no rigid rule of morals, and has happily reconciled the claims of convenience with the duties of good faith by requiring the purchaser to apply his attention to those particulars which may be supposed to be within the reach of his observation and judgment, and the vendor to communicate those particulars and defects which cannot be supposed to be within the reach of such attention; and even against his want of vigilance the purchaser may provide by requiring the vendor expressly to warrant the property sold.

It has been contended that an action for money had and received, being in the nature of a bill in equity, lies in all cases where the defendant has received money which he cannot in good conscience retain; and hence, in the case of a sale of land to which the vendor had no title, the consideration of the payment having failed, the money should be refunded. But although the title to bargained premises may prove defective, it does not follow that the money paid therefor may not in good conscience be retained. It may have been the intent of the parties that the purchaser should assume the risk of title; and this, in many instances, must be presumed from the nature of their acts. Unlike a sale of chattels, where possession is a strong evidence of title, and in most cases the only evidence the purchaser can obtain, no warranty can be implied; the title of land depends on writings, presumably of equal access to either; and of these writings one party is as able to judge as the other. It is incumbent on the purchaser to investigate; to ascertain to his own satisfaction the claims on which the vendor asserts his title, and to resolve any doubts that may present themselves as a result of such investigation. Failing in this, it is fair to presume that he is willing to assume what-

[1] Pryse v. McGuire, 81 Ky. 608.

ever risks may attend the sale. It is true that one who in selling land asserts his title to be good when he knows that it is not is not excused by the fact that the purchaser, by examining the records, might have discovered the defects;[1] for, as before remarked, men in their dealings with each other are bound to the exercise of good faith, and either has a right to rely upon the statements and representations of the other; but this involves the question of fraudulent intent, which is governed by entirely different principles.

With respect to the form of the action by which a vendee may sue to recover back purchase money where the title has failed there is some controversy. As a general rule an action of *assumpsit* will not lie to try the title to land;[1] and as this question is inseparably connected with the right of recovery, it would seem that recourse should be had to equity to declare a rescission. But if the supposed conveyance was altogether void for any reason, or brought about by fraud, and the vendee had rescinded the contract on that ground, as by law he might, the right to reclaim the money paid in this form of action might be admitted.

§ 3. Incumbrances. A long and unbroken line of authority has definitely settled the rule that in all contracts for the sale of land, in the absence of special agreement, the purchaser has the right to demand a clear title, and the vendor is under obligation to produce the same. If, at the time the contract is entered into, incumbrances exist, it is the duty of the vendor to remove them, and until he has done so he cannot compel payment of the purchase money.[2] The purchaser is under no obligation to accept a deed of incumbered property,[3] even though containing covenants of general warranty and against incumbrances; but it seems that, should he do so, he will still have the right to retain sufficient of the purchase money to discharge the outstanding liens.[4] It is said that this right of the vendee

[1] Hogsett v. Ellis, 17 Mich. 351; Codman v. Jenkins, 14 Mass. 93; Boston v. Binney, 11 Pick. (Mass.) 1; King v. Mason, 42 Ill. 223.

[2] Cooper v. Singleton, 19 Tex. 260; Thompson v. Christian, 28 Ala. 399.

[3] But see Galvin v. Collins, 128 Mass. 525.

[4] Douglass v. Rutherford, 25 W. Va. 708; Fillial v. Cobb, 36 La. Ann. 792; Findly v. Horner, 9 Neb. 537; Reading v. Gray, 37 N. Y. Sup. Ct. 79; Skinner v. Moye, 69 Ga. 476; and see Lowry v. Hurd, 7 Minn. 366; Peck v. Jones, 70 Pa. St. 83; Austin v. McKinney, 5 Lea (Tenn.), 488. It

to apply any part of the purchase money remaining in his hands to the extinguishment of liens rests upon the theory that the vendor, being bound both in conscience and in law to remove the incumbrance, cannot complain of the purchaser's doing what he himself should do; and that the purchaser should not be required to yield up the purchase money until the title to the land is free from defects.

It would seem further, that, in order to make this defense available, the money should actually be used in the extinguishment of the incumbrance; for it is well settled that where the incumbrance has not been paid off by the purchaser, and he has remained in quiet and peaceable possession of the land, he cannot have relief against his contract to pay the purchase money, or any part of it, on the ground of defect of title.[1] The reason ascribed for this is that the incumbrance may not, if let alone, ever be asserted against the purchaser, as it may be extinguished or satisfied in some other way; and then it would be inequitable that any part of the purchase price should be retained.[2] Again, while some of the authorities lay down the rule that the purchaser may set off or recover the amount paid without any qualification, another, and it would seem better-considered, class of cases holds that the purchaser must prove either that what had been paid by him was actually due, or that he had given notice to his vendor requiring that such vendor should pay off the incumbrance within a limited time, or that otherwise the purchaser would pay the specified amount.[3] The justice of this rule is apparent; and where a vendee has voluntarily paid off incumbrances whose possession was not necessary to protect his title, he cannot recover the amount paid from his vendor.[4] It would seem also that a purchaser

has been held that where a party purchases land incumbered with a judgment lien, and receives a general warranty deed from the vendor, he may apply the unpaid purchase money to the payment of the judgment, although execution thereunder has been levied upon other land of the vendor sufficient to satisfy the judgment. Dunklebarger v. Whitehall, 70 Ind. 214.

[1] See authorities cited under sec. 00.

[2] Grant v. Tallman, 20 N. Y. 191; and see English v. English, 69 Ga. 636.

[3] Grant v. Tallman, 20 N. Y. 191. But the incumbrance must be extinguished, and the vendee cannot set up any title thus acquired as against the vendor. Munford v. Pearce, 70 Ala. 452.

[4] Charles v. Ashby, 14 Neb. 251; but see Dunklebarger v. Whitehall, 70 Ind. 214.

who, instead of taking a deed direct from his vendor, accepts one from a party who has contracted to convey to his vendor, thereby waives his right of recourse against the latter for money which he is compelled to pay in removing incumbrances from the land.[1]

The cases are not altogether harmonious in the solution of the question as to whether the existence of an outstanding incumbrance constitutes a whole or a partial failure of consideration. Where a vendee receives the possession of the premises and is in the quiet possession thereof, the rule seems to be that he cannot interpose such a plea to an action for the purchase money or upon the notes given for the deferred payments, unless he can show that fraud has been practiced upon him in the transaction; but under other circumstances, where the land sold is warranted to be free from incumbrances, if at the time of the execution of the deed there is a subsisting incumbrance on the same, it would seem that to the extent of the incumbrance there is a failure of consideration.[2] In some instances it has been held that a defect or incumbrance not known to the vendee when he accepts the deed is a defense to a bond for purchase money, although there be a general warranty.[3]

In certain cases relief has been granted in equity against payment of purchase money until the purchaser could be secured against existing incumbrances or defects of title where there were doubts of the grantor's solvency.[4] And where a vendee had given notes for the purchase money, and it was shown that there was a defect in the title, of which the vendor had guilty knowledge, and that the latter was insolvent, the vendee was permitted to have the contract rescinded, the un-

[1] Herryford v. Turner, 67 Mo. 296.

[2] Schuchmann v. Knoebel, 27 Ill. 175; Christy v. Ogle's Ex'rs. In this case a deed was made with warranty, and at the time there was a subsisting incumbrance upon the land consisting of a life estate in the grantor, which was inalienable in its character. *Held*, where the grantee executed his note for the purchase money of the entire estate, which the deed purported to convey, the existence of this incumbrance constituted a failure of consideration of the note to the extent of the value of the estate, which he did not and could not enjoy.

[3] Peck v. Jones, 70 Pa. St. 83.

[4] Jones v. Stanton, 11 Mo. 436; Bowen v. Thrall, 28 Vt. 385; Woodruff v. Bunce, 9 Paige (N. Y.), 443.

paid note canceled and the cash payment charged on the vendor's actual interest.[1] So, too, it has been held in a case of executory contract, where the vendee had been let into possession that in case of outstanding incumbrance, if the vendor insists upon the payment of the purchase money to himself, and refuses to permit it to be applied to the extinguishment of the incumbrance, the vendee may file a bill in equity for a specific performance of the contract, making the creditor as well as the vendor parties thereto, so that the purchase money may be applied under the direction of the court, which will effectually protect him against the claims of both.[2] But as stated in the opening sentences of this paragraph a vendee is under no obligation to accept a deed of incumbered property where his agreement calls for a clear title; and for this reason he may refuse to accept such deed when tendered, notwithstanding it may purport to contain covenants of warranty and against incumbrances. In such event, should the vendor be unable to remove the incumbrance, the purchaser may elect to rescind the contract and recover back the part of the purchase money already paid.[3]

§ 4. **Erroneous deed.** It is a general rule in equity that a vendor cannot avoid the consequences of a deed which through error or inadvertence fails to convey the property as intended, and that such instrument, while it will be denied effect as a deed, will nevertheless be suffered to stand as an executory contract which the vendee may enforce. So, also, where the vendor conveys a tract which does not belong to him, instead

[1] Diggs v. Kirby, 40 Ark. 420.

[2] Parks v. Jackson, 11 Wend. (N. Y.) 442.

[3] A valid attachment for a substantial amount, placed on the estate after the sale and before the tender of the deed, is such an incumbrance as, in a court of law, justifies the purchaser in such a course where the conditions of sale provide that the deed is to be ready "on or before fifteen days or as soon as the papers can be completed from the day of sale." Linton v. Hichborn, 126 Mass. 32. Where a party contracted for the purchase of real estate and paid a part of the purchase money, the vendor agreeing to convey by a warranty deed upon payment of the purchase money, but afterwards the vendee discovered that the vendor had not a perfect title and refused to pay the balance of the purchase money and brought suit to recover the amount paid, *held*, that he could maintain the action, and was not obliged to accept a deed which would not convey to him a perfect title to the land. Falkner v. Guild, 10 Wis. 563.

of that which he has sold and intends to convey, the vendee is not in equity entitled to a return of the purchase money, but will be compelled to accept a deed for the proper land.[1] Where, however, by the agreement, the conveyance of the land is to precede the payment of the purchase money, and the vendor gives a deed which so imperfectly describes the land as to convey no title, no action will lie for the money until a good and sufficient deed shall have been made and tendered.[2]

§ 5. **Right to deduct for waste and spoliation.** Very frequently the produce or increment of land constitutes its chief value, and forms the main inducement to the purchase. A loss of this is practically a loss of the land itself, of which it constituted a part. Its spoliation is waste; a palpable diminution of the value of the inheritance. Thus, standing timber is a part of the realty and passes with it under a conveyance; and it has been held that if, between the sale and a tender of conveyance, the vendor strips the land of timber, or suffers it to be done, in equity his claim for the purchase money would be liable to reduction; nor would the fact that the spoliation was committed by an adverse claimant, whom he had suffered to recover and take possession, change this right to defalcate in equity.[3] In such case there has been a partial failure of consideration available by the vendee in an action for the purchase price.

§ 6. **Voluntary rescission.** A mutual rescission by consent implies a complete restoration of all that has been received on either side — that the vendee shall surrender all rights acquired under the contract and that the vendor shall restore the purchase money. If upon such rescission the vendee gives up the possession of the land and the vendor accepts the same, he should at the same time repay any moneys that may have been advanced in payment, and failing so to do the vendee may recover back the payments made by him in an action for money had and received.[4]

[1] Gilmore v. Hamblin, 37 Ark. 626.

[2] Overly v. Tipton, 68 Ind. 410.

[3] Weakland v. Hoffman, 50 Pa. St. 513. In this case the vendor made his title to the land good by a second suit, and reinstated his vendee; but the loss of the timber in the interim was held to be a waste for which he was responsible to his vendee.

[4] Baston v. Clifford, 68 Ill. 67; Bat-

It would seem, however, that this general rule does not apply where there is an agreement with the rescission which restricts its operation and effect. And so it has been held that where there is an express surrender, by one or both of the parties, of all claims under the contract — as where the vendor gives up all claim to the purchase money and all right to enforce the contract, and the vendee relinquishes all rights acquired by the contract to the premises and any interest or claim by virtue of the same — the legitimate effect of such an agreement is that of a mutual release; that the vendor has no claim against the vendee for the balance of the purchase money remaining unpaid, nor the vendee against the vendor for what he has paid.[1]

§ 7. **Vendor's inability to perform.** Ordinarily, under an agreement to execute a deed upon the payment of a given sum of money, the vendor is not in default in not making or tendering the deed while any portion of the money remains unpaid; and in order to put the vendor in default, so as to enable the vendee to treat the contract as rescinded and sue for the recovery of the money already paid in, he must be able and willing to pay the amount due and offer so to do.[2] Yet, if the vendor does not possess a title to the bargained property, and for that reason is unable to comply with the terms of the contract, the vendee becomes absolved from any duty or obligation thereunder.[3] He need not tender the balance due, for the law requires no useless ceremony; and if it appears that the vendor was not entitled to, and could not receive, the unpaid purchase money, he has no right to claim a tender of the same. The vendee, in such case, has a right to repudiate the contract as for-

tle v. Rochester Bank, 3 Comst. (N. Y.) 91; Gillett v. Maynard, 5 Johns. 86.

[1] Tice v. Zinsser, 76 N. Y. 549. In this case the parties entered into a written agreement for the sale of certain lands; the vendee paid $1,000 of the purchase money down, and received possession of the premises. Subsequently the parties executed an instrument by the terms of which each surrendered all his right, title and interest, under and by virtue of the agreement, and agreed that the same be canceled. *Held*, that by the release the vendee gave up all right to the money paid.

[2] Cassell v. Ross, 33 Ill. 244; Irvin v. Bleakly, 67 Pa. St. 28.

[3] Smith v. Lamb, 26 Ill. 397; Richards v. Allen, 17 Me. 296; Newcomb v. Bracket, 16 Mass. 161; Turner v. Parry, 27 Ind. 163; Thurston v. Franklin College, 16 Pa. St. 154; White v. Dobson, 17 Gratt. (Va.) 262.

feited by the vendor, and to recover the money paid on the same as for money had and received; and all this notwithstanding that time was made of the essence of the contract, and that the vendee was to forfeit all payments made on failure to perform on his part.[1] Nor will the fact that the vendor has prepared and tendered a deed, if at the time he has no title, and hence is not in position to convey, be sufficient to enable him to declare a forfeiture or prevent the vendee from recovering any payments made with interest.[2]

But while the vendor cannot compel payment for land which he is unable to convey by proper deeds, neither can he urge his inability as a reason for non-performance, if he is able to convey part of the property contracted for and the vendee is willing to accept the same; for the general rule in such cases is that the purchaser, if he chooses, is entitled to have the contract specifically performed as far as the vendor can perform it, and have an abatement of the purchase money or compensation for any deficiency in the title, quantity, quality or description of the estate.[3] So, too, if the contract has been executed by conveyance and the vendor has warranted the title, whether the portion lost is much or little, the vendee may elect to hold so much of the land as he can and compel the vendor to abate the purchase money if unpaid, or, if paid, to make compensation for the land so lost by reason of want of title or right in the vendor.[4]

§ 8. **Vendee's refusal to perform.** Where there is a total failure of title on the part of the vendor the vendee may, if the contract be executory, refuse to perform it and reclaim any portion of the purchase money he may have paid.[5] But usually the law will not permit a party to maintain an action on his own breach of his own contract; and where a vendee who has paid money upon a contract of purchase refuses to proceed, he cannot, save under very exceptional circumstances, sustain an action to recover back the amount of the payments so made.

There is no doubt as to the general rule, so often stated,

[1] Smith v. Lamb, 26 Ill. 397.

[2] Bitzer v. Orban, 88 Ill. 130.

[3] Waters v. Travis, 9 Johns. (N. Y.) 465.

[4] Butcher v. Peterson, 26 W. Va. 447.

[5] House v. Kendall, 55 Tex. 40.

that where a vendee has partially performed the stipulations of the contract he cannot be put in default for non-performance further without a tender of a deed and demand for what more is to be done by him.[1] But this rule is not cast in a rigid mold, and, as generally interpreted, amounts to no more than a willingness and ability to perform on the part of the vendor; and if actual tender or strict performance has been waived or prevented the vendor may be excused from literal fulfillment without any impairment of his rights. So, it has been held, strict performance may be dispensed with by some act or declaration;[2] and where the vendee announces his inability to make payment at the time designated by the contract, the vendor will be excused from the formal presentation of a deed or an actual demand of payment. If the vendee is fully apprised that the vendor is ready and willing to perform, and the vendee is not ready, and the vendor thereafter conveys the property to another, the vendee cannot then elect to consider the contract as rescinded by his vendor and sue to recover back his purchase money paid; for to suffer this would, in effect, be to declare that a party may violate his agreement and make the infraction of it by himself a cause of action. This the law does not allow.[3] Nor is the rule at all impaired by the fact that the retention of the purchase money by the vendor is more than would amply compensate him for the damage sustained by the vendee's failure to fulfill the contract.

§ 9. Recovery of the deposit. The earnest money or deposit which usually accompanies the execution of a contract of sale is put up generally as a guaranty of good faith, and by a special stipulation is ordinarily forfeited to the vendor in case of non-performance by the vendee. On the other hand, if the title of the property should upon examination prove defective, and the vendee for that reason refuses to consummate the contract, the deposit is returned to him. But while the deposit is, as a rule, intended only as an earnest, it is also an integral part of the transaction, representing a portion of the purchase money, and in all contracts drawn with any degree of technical exactness it is so denominated. Upon the rescission of an

[1] Leaird v. Smith, 44 N. Y. 618.

[2] Bakeman v. Pooler, 15 Wend. (N. Y.) 637.

[3] Lawrence v. Miller, 86 N. Y. 131.

agreement for sale or a cancellation of the contract, provision is usually made for the return of the money so advanced; but independently of any recitals to that effect, or in case the contract is silent upon this point, the law implies a promise on the part of the vendor to repay such amounts as may have been advanced to him.[1] But if the purchaser has had the possession of the land, while he may recover back the money he has paid he cannot recover interest for the time during which he was in possession, as his use of the land will ordinarily be deemed equivalent to interest.[2]

§ 10. **Vendee under quitclaim deed.** The remarks of the present chapter have special reference only to purchasers by deed of bargain and sale and with warranty, for the principle is well established that a quitclaim deed conveys the grantor's title if he has any; but a party who takes a deed of this character on the sale of land runs the risk of the goodness of the title, unless some fraud has been practiced upon him.[3] Indeed quitclaim deeds are usually made because the vendor is unwilling to warrant the title, and are accepted because the grantee is willing to take the hazard of the same, and believes it is worth the price he pays or agrees to pay. Hence, such deeds are, in the absence of fraud, a sufficient consideration in each case to support a contract, and the money paid for such conveyance cannot be recovered back, or a plea of failure of consideration interposed as against securities given for the same.[4]

[1] Beaman v. Simmons, 76 N. C. 43.

[2] White v. Tucker, 52 Miss. 145.

[3] Sheldon v. Harding, 44 Ill. 68.

[4] Botsford v. Wilson, 75 Ill. 132. So where a purchaser had given to his vendor his bond for the payment of money in consideration of a quitclaim deed from the latter to land also claimed by the former, he cannot defend an action on such bond on the ground of a failure of consideration, in that the vendor had no title to the land, without showing that while in the exercise of due diligence on his part he had been misled by the fraudulent pretensions of the vendor to a title which he knew he did not possess. Foy v. Haughton, 85 N. C. 168.

Art. IV. Parol Contracts.

§ 1. Actions by the vendor.
2. Actions by the vendee.
3. Failure of consideration.
§ 4. Recovery of value of consideration — Work and labor.
5. Demand for deed.

§ 1. Actions by the vendor. Whether an action can be maintained at law to recover the purchase money of land in a case where no note or memorandum has been made is a question that has often been presented for adjudication in this country, and has been productive of much discussion and of greatly varying determinations. A court of chancery, acting on its own peculiar rules, will in proper cases and for the prevention of fraud enforce a specific performance of a verbal contract of sale; but no such power has ever been acknowledged to reside in a court of law. The ground on which a court of equity proceeds in cases of part performance is that sort of fraud which is cognizable in equity only; and while some isolated cases may be found in which it has been held that the equitable circumstances which would authorize a court of chancery to grant relief might be considered in a court of law, the decisive current of authority is the other way. The statute is usually strictly construed; its provisions are peremptory and mandatory; and if a full compliance is wanting, no rights can be derived by either party in a court of law, whatever may be their rights in equity.[1]

§ 2. Actions by the vendee. The general rule is that, where the contract of sale is not by deed, and no conveyance has been made, the vendee can, when the consideration has failed or the contract been rescinded, or the vendor failed to comply, recover in *assumpsit* what he has paid on the contract, and equity has no jurisdiction.[2] Where a contract has been rescinded, the rule is universal that a party who has paid money thereon is entitled to a recovery of the same; and this rule has frequently been applied in cases of oral contracts for the sale of land. Hence, if the vendor under such a contract, after a part of the purchase has been paid, refuses to accept further pay-

[1] Johnson v. Hanson, 6 Ala. 351; Donaldson v. Waters, 30 Ala. 181. Eaton v. Redick, 1 Neb. 305; Reddington v. Henry, 48 N. H. 273.

[2] Bier v. Smith, 25 W. Va. 830;

ments and sells the property to another, this will amount to a rescission, and the vendee may maintain an action to recover back whatever money he may have paid upon such contract.[1] In all cases, however, before the purchaser can recover back a partial payment made by him upon a parol contract, he must aver and prove a readiness to pay the balance, and a refusal by the vendor to convey.[2]

But while the vendee may under certain circumstances maintain an action at law to recover back all or a portion of the purchase money paid by him, yet if he repudiates the contract and refuses to fulfill the same, and the vendor is willing and offers to perform on his part, no action will lie to recover the portion of the purchase price actually paid.[3] Nor is it material in such a case that the contract was by parol and within the statute of frauds.[4] Nor will the fact that the vendor sells the land to another alter the case, if, before such second sale, the original vendee had refused to proceed; for were it otherwise the effect would be to prevent the vendor from ever selling without subjecting himself to an action, while it is equally plain that the vendee should not be permitted, by his own wrongful act, to impose upon the vendor the necessity of retaining property which his exigencies may require him to sell.[5]

§ 3. Failure of consideration. Upon the principle that the vendee is in equity the owner of the property from the time of sale, it has in numerous instances been held that he must pay the consideration therefor, even though that part of the property which gives to the whole its greatest value is destroyed between the agreement and the conveyance; as, where the houses or other improvements are destroyed by fire the loss will fall on the purchaser.[6] But it seems that this rule does not apply to parol contracts of purchase, even where the purchaser has been let into possession. And where under a parol

[1] Gillet v. Maynard, 5 Johns. (N. Y.) 85; Beaman v. Simmons, 76 N. C. 43.

[2] Sennett v. Shehan, 27 Minn. 328.

[3] McKinney v. Harvie, 38 Minn. 18; Plummer v. Buckham, 55 Me. 105; Galway v. Shields, 66 Mo. 313; Gray v. Gray, 2 J. J. Marsh. (Ky.) 21; Day v. Wilson, 83 Ind. 463; Ketchum v. Evertson, 13 Johns. (N. Y.) 359. But see Raub v. Smith, 61 Mich. 543.

[4] McKinney v. Harvie, 38 Minn. 18; Venable v. Brown, 31 Ark. 564.

[5] Ketchum v. Evertson, 13 Johns. (N. Y.) 359.

[6] Robb v. Mann, 11 Pa. St. 300; McKechnie v. Sterling, 48 Barb. (N. Y.) 330.

agreement the purchaser had advanced the purchase money, and by permission of the vendor had entered into possession, but the buildings, which constituted the chief value of the land, were destroyed by fire prior to the execution and delivery of the deed, it was held that an action would lie to recover the purchase money paid, and that, as no conveyance had been made at the time of the fire, the property was at the risk of the vendor, upon whom the loss must fall. Under such circumstances it would seem that the purchaser is not bound to accept a deed for the land only, and that he would have a right to recover the purchase money advanced, as money paid on a consideration which had failed.[1]

§ 4. **Recovery of the value of consideration — Work and labor.** Very frequently contracts are made for the sale of real property in which the purchase price is stipulated to be paid in work or labor of a general specified character but of undefined nature and extent; as that it shall be paid in carpenter work, dentistry, etc., an oral agreement being subsequently made to carry the stipulation into effect. Again, it often happens that after the execution of a contract an oral agreement is made stipulating that the purchase price named in the contract, though expressed in "dollars," may be paid in services of the value of the expressed sum. In either case, where after the performance of the work or labor the vendor refuses or is unable to perform, an action may be maintained against him to recover the value of the work or labor. The oral agreements as to the mode of payment will not, in such cases, be affected by the statute of frauds, for the suit is brought not to compel performance of the contract of sale, but upon the oral agreement; the action being based upon a refusal of the vendor to perform and thus pay for the work done.[2]

§ 5. **Demand for deed.** Where a vendor has received the purchase money for land which he has agreed to convey, if no time is specified he is entitled to a reasonable time within which to make the conveyance, and in such case there should be a demand for a deed and a refusal before a suit for the purchase money.[3]

[1] Thompson v. Gould, 20 Pick. (Mass.) 134.

[2] Moody v. Smith, 70 N. Y. 598.

[3] Kime v. Kime, 41 Ill. 397.

CHAPTER XXXV.

ACTIONS FOR DAMAGES.

ART. I. ON THE CONTRACT.
ART. II. ON THE COVENANTS.

ART. I. ON THE CONTRACT.

§ 1. General principles.
2. Continued — When right of action accrues.
3. Failure to perform — Vendor's refusal.
4. Continued — Vendee's refusal.
5. Failure to perform collateral agreements.
6. Illegality precludes recovery.
7. Mutuality.
8. Deceit or fraud — False representations.
9. Continued — Fraudulent concealment.
10. False statements without fraud.
11. False representations as to value.
12. False representations as to appurtenances.
13. False representations as to the condition of the property.
14. False representations as to quantity.
15. Failure to assign insurance policy.
16. Waste.
17. Injuries to lands.
18. Deprivation of possession.
19. As affected by limitation.
20. Penalties and liquidated damages.
21. Continued — Non-performance of stipulations.
22. Damages by way of recoupment.
23. Compensatory damages in equity.
24. Damages for breach of a parol agreement.

§ 1. General principles. Actions for damages are strictly legal in character, for it is one of the settled principles of equity not to entertain bills for compensation or damages, except as incidental to other relief, whenever the contract is of such a nature as to afford an adequate remedy at law. They lie in a vast number of instances, and are frequently resorted to in preference to equitable remedies.

Where there has been a fraudulent concealment or misrepresentation of facts, materially affecting the value of the property sold, the purchaser may either repudiate the contract and restore possession, or he may elect to stand by his purchase and sue for damages.[1] Performance on his part, although

[1] Owens v. Rector, 44 Mo. 389; Fed. Rep. 486; Doherty v. Dolan, 65 Lynch v. Mercantile Trust Co. 18 Me. 87; Krum v. Beach, 96 N. Y.

with a knowledge of the fraud acquired subsequently to the making of the contract and previous to performance, while it would preclude a rescission, will not bar him of any remedy for the recovery of damages.[1] So, too, whenever there has been a breach of a valid contract or a failure to perform, instead of a bill for specific performance the injured party may rely upon compensation by way of damages, and will always be entitled to some damages, even though they be merely nominal.[2] But where the injured party, upon the breach of a contract, brings his action, not for rescission, but to recover damages for the breach, he thus affirms the contract and concedes the right of the other party to retain the consideration paid, while the *onus* is upon him of proving the breach and the amount of damages sustained thereby, the recovery being limited to the damages thus proved.[3] Where a breach has been established it is a further principle, applicable in the main to all contracts, that the party injured by such breach is entitled to recover all his damages, including gains prevented as well as losses sustained, provided they are such as naturally and ordinarily flow therefrom;[4] and further, that parties are presumed to contemplate the usual and natural consequences of the breach when the contract is entered into.[5] Such dam-

398; White v. Sutherland, 64 Ill. 181. He is not entitled to both remedies, however, and the selection of one precludes a resort to the other. Strong v. Strong, 102 N. Y. 69. The reason for this is that the remedies, being inconsistent, cannot both be prosecuted and maintained; but a party may resort to as many remedies as he legally has, provided they are consistent and concurrent. Bowen v. Mandeville, 95 N. Y. 237. Yet the injured party can recover but one satisfaction for the damages suffered, no matter how many actions he may be entitled to prosecute for their recovery.

[1] Parker v. Marquis, 64 Mo. 38; White v. Sutherland, 64 Ill. 181. But see Emma Mining Co. v. Emma Mining Co. 7 Fed. Rep. 401.

[2] Conger v. Weaver, 20 N. Y. 140; Hogan v. Riley, 13 Gray (Mass.), 515; Mecklem v. Blake, 22 Wis. 495; Bogby v. Harris, 9 Ala. 173; Brown v. Emerson, 18 Mo. 103; French v. Bent, 43 N. H. 448; Freese v. Crary, 29 Ind. 524.

[3] Quinn v. Van Pelt, 56 N. Y. 417.

[4] Booth v. Rolling Mill Co. 60 N. Y. 487; Billmeyer v. Wagner, 91 Pa. St. 92; Mihills Manuf. Co. v. Day, 56 Iowa, 250; White v. Miller, 71 N. Y. 118; Cox v. Henry, 32 Pa. St. 18; Barbour v. Nichols, 3 R. I. 187.

[5] Paine v. Sherwood, 21 Minn. 225; Doricourt v. Lacroix, 29 La. Ann. 286; Brock v. Gale, 14 Fla. 523; Hamilton v. McPherson, 28 N. Y. 72; Freeman v. Morey, 41 Me. 588.

ages must, however, be proximate and certain, or capable of certain ascertainment,[1] and not remote,[2] speculative[3] or contingent.[4] Yet damages will not be denied merely because their nature is such that they cannot be accurately measured; for if they cannot be determined by any fixed rule, all facts and circumstances tending to show what they are may be considered, and for that purpose should be submitted to the jury.[5]

It has sometimes been contended that, in respect to executed sales of real estate, where deeds have been given with covenants, the ordinary principles governing actions for damages, and particularly those which obtain in actions for deceit or fraud, do not apply, as the party suffering damage has a remedy on the covenants of his deed.[6] It appears, however, to be well settled that actions for fraud in the sale of real property will lie, notwithstanding a conveyance has been made with covenants. The fraudulent artifice constitutes an element of turpitude that makes the conduct of the party employing it a tortious act, and one which the law recognizes and for which it affords a remedy. The liability of the offending party is totally distinct in either case. In the one it arises *ex contractu*, in the other *ex delicto;* and the rule upon which damages are awarded is different in each instance. Nor is there any inconsistency in the prosecution of the two remedies, as they both proceed upon the theory of an affirmance of the contract, and although differing in form one does not allege what the other denies.[7] A recovery in one, therefore, will not preclude a prosecution of or recovery in the other, although, of course, there can be but one satisfaction for the damages sustained.[8]

§ 2. **Continued — When right of action accrues.** It would seem to be a proposition adapted to the rulings in recent English decisions, that an action may be brought for the breach

[1] James v. Adams, 8 W. Va. 586.

[2] Basch v. R. R. Co. 44 Iowa, 402.

[3] Fitzsimmons v. Chapman, 37 Mich. 139; Fort v. Orndott, 7 Heisk. (Tenn.) 167; Gilbert v. Cherry, 57 Ga. 128.

[4] Freidland v. McNeil, 33 Mich. 40; Black v. Coan, 48 Ind. 385.

[5] Gilbert v. Kennedy, 22 Mich. 117.

[6] See Peabody v. Phelps, 9 Cal. 213.

[7] In one case the recovery is based upon the liability created by the contract, in the other upon the liability incurred for a violation of the duty of honesty and fair dealing which the law enjoins upon all men in their transactions with others.

[8] Bowen v. Mandeville, 95 N. Y. 237; Allaire v. Whitney, 1 Hill (N. Y.), 484.

of an agreement at any time after a refusal of performance, notwithstanding the time stipulated for the fulfillment of the agreement has not arrived; in other words, that a refusal of performance, purporting and intended to be an absolute and unqualified declaration of a purpose not to complete the contract at any time, constitutes of itself a present breach of contract, by repudiation, for acts to be done within a time not yet expired, so that an action will lie forthwith.[1] It is contended, in support of this proposition, that the promisee has an inchoate right to the performance of the contract, which becomes complete when the time for such performance has arrived; that in the meantime he has a right to have the contract kept open as subsisting and effective, its unimpaired and unimpeached efficacy being in many instances essential to his interests, while his rights acquired under it may be dealt with by him in various ways for his benefit and advantage; that the contract having been broken by the promisor and treated as broken by the promisee, performance at the appointed time becomes excluded, and the breach by reason of the future non-performance becomes virtually involved in the action as one of the consequences of the repudiation of the contract; that the eventual non-performance, therefore, may by anticipation be treated as a cause of action, and damages be assessed and recovered in respect of it, though the time for performance may yet be remote.

It is doubtful, however, if these doctrines have ever received any recognition by the courts of this country. A renunciation of the agreement by declarations or inconsistent conduct before the time of performance may give cause for treating it as rescinded and excuse the other party from making ready for performance on his part, or relieve him from the necessity of offering performance in order to enforce his rights. It may destroy all capacity of the party, so disavowing its obligations, to assert rights under it afterward, if the other party has acted upon such disavowal; but it is difficult to perceive how it can of itself constitute a present violation of any legal rights of the other party or confer upon him a present right of action; for until the time arrives when, by the terms of the agreement, he

[1] See Frost v. Knight, L. R. 7 Ex. 111 (1872); Hochster v. De la Tour, 2 E. & B. 678.

is or might be entitled to its performance, he can suffer no injury or deprivation upon which he can found a ground for damages.[1]

The true rule seems to be that, in order to charge one in damages for breach of an executory personal contract, the other party must show a refusal or neglect to perform at a time when and under conditions such that he is or might be entitled to require performance.[2]

§ 3. Failure to perform — Vendor's refusal. The rule is well established that where the vendor has title and for any reason refuses to convey it, as required by the terms of the agreement, he shall respond in damages and make good to the vendee whatever he may have lost by reason of the breach.[3] So far as money can do it the vendee must be placed in the same situation with regard to damages as if the contract had been specifically performed;[4] and the measure of such damages will ordinarily be the difference between the contract price and the value of the property at the time of the breach.[5] This has always been regarded as the true measure of damages in actions on contracts for the future delivery of marketable commodities; and it makes no difference in principle whether the contract be for the sale of real or personal property.[6] In both instances the vendee is entitled to have the thing agreed for at the contract price, and to sell it him-

[1] Daniels v. Newton, 114 Mass. 530.

[2] Frazier v. Cushman, 12 Mass. 277; Hapgood v. Shaw, 105 Mass. 276.

[3] Pumpelly v. Phelps, 40 N. Y. 59; Doricourt v. La Croix, 29 La. Ann. 286; Martin v. Wright, 21 Ga. 504; Cox v. Henry, 32 Pa. St. 18; Drake v. Baker, 34 N. J. L. 358.

[4] Chartier v. Marshall, 56 N. H. 478.

[5] Hopkins v. Lee, 6 Wheat. (U. S.) 109; Doherty v. Dolan, 65 Me. 87; Burr v. Todd, 41 Pa. St. 206; Clagett v. Easterday, 42 Md. 617; Lawrence v. Chase, 54 Me. 194; Boardman v. Keeler, 21 Vt. 84; Kirkpatrick v. Downing, 58 Mo. 32; Burdick v. Seymour, 39 Iowa, 452; Allen v. Atkinson, 21 Mich. 364; Bryant v. Hambrick, 9 Ga. 133. Or, if the consideration has been paid, the value of the land at the time the contract should have been performed. Burdick v. Seymour, 39 Iowa, 452. But see Ewing v. Thompson, 66 Pa. St. 382.

[6] Hopkins v. Lee, 6 Wheat. (U. S.) 109; Mograff v. Muir, 57 N. Y. 155. This would now seem to be the established doctrine, notwithstanding there are many cases of undoubted learning and ability which sustain the same rule for the ascertainment of damages in executory contracts for the sale of land as prevails in actions on the breach of the covenant of warranty; that is, the amount of the purchase money paid, with interest from the time of payment.

self at its increased value, and if it be withheld the vendor should make good to him the difference.[1]

It would seem, however, that where a vendor contracts to sell and convey in good faith, believing that he has a good title, and afterwards discovers his title is defective, and for that reason, without any fraud on his part, refuses or is unable to fulfill his contract, he is only liable for nominal damages on account of such breach.[2] This rule, wherever it has been invoked as a rule, has never been favorably regarded by the courts, and seems to have been productive of a great diversity of opinion as to the grounds upon which it is based.[3] It has been rejected by the supreme court of the United States,[4] and is not recognized in many of the state courts,[5] while in states where it obtains it is strictly limited to those cases coming wholly and exactly within it.[6]

But where the vendor contracts to sell lands which he knows at the time he has not the power to convey he must abide by his contract, and should be held to make good to the vendee any loss he may sustain by reason of its violation;[7] nor is it

[1] Hopkins v. Lee, 6 Wheat. (U. S.) 109; Drake v. Baker, 34 N. J. L. 358; Lawrence v. Chase, 54 Me. 194; Boardman v. Keeler, 21 Vt. 84; Kirkpatrick v. Downing, 58 Mo. 32; Barnham v. Nichols, 3 R. I. 187; Wells v. Abernethy, 5 Conn. 222; Plummer v. Rigdon, 78 Ill. 222; Gibbs v. Jemison, 12 Ala. 820. The reason of the rule is one that must commend itself to every one. In this country land is, in a very marked degree, an article of commerce. Values ofttimes rapidly appreciate; citizens are constantly investing their means in this class of securities for the purposes of legitimate profit and speculation, and that they should be deprived of expected benefits by the wrong-doing of the vendor is palpably unfair and unjust.

[2] Baldwin v. Munn, 2 Wend. (N. Y.) 399; Pumpelly v. Phelps, 40 N. Y. 59; Cockroft v. R. R. Co. 69 N. Y. 201; Hammond v. Hannon, 21 Mich. 374; Beard v. Delaney, 35 Iowa, 19.

[3] The rule seems to have been sustained in England upon the ground of an implied understanding of the parties, who were presumed to have in contemplation the difficulties attendant upon the conveyance. See Flureau v. Thornhill, 2 W. Bl. 1078; Bain v. Fothergill, L. R. 7 Eng. & Ir. App. 158. In this country the rule is said to be based upon the analogy between this class of cases and actions for breach of contract of warranty of title. See cases cited in preceding note.

[4] Hopkins v. Lee, 6 Wheat. (U. S.) 109.

[5] See Gale v. Dean, 20 Ill. 320; Whiteside v. Jennings, 19 Ala. 784; Warren v. Wheeler, 21 Me. 484; Barbour v. Nichols, 3 R. I. 187; Shaw v. Wilkins, 8 Humph. (Tenn.) 647.

[6] Pumpelly v. Phelps, 40 N. Y. 59.

[7] Drake v. Baker, 34 N. J. L. 358. In the leading English case of Bain v. Fothergill, L. R. 7 Eng. & Ir. App.

any excuse for the vendor in such a case that he may have acted in good faith, and fully believed when he entered into the contract that he should be able to procure a good title for his purchaser.[1] So, too, if subsequent to the making of the contract the vendor conveys the property to another, thereby depriving himself of the ability to perform specifically, the purchaser is entitled to damages for the loss of his bargain, the measure of which would be according to the rule first stated; and the price for which the property has been resold is *prima facie* evidence of its market value.[2]

It must frequently happen, however, that there will be no appreciable difference between the contract price and the value of the land at the time of the breach, and in such case, if the vendee has paid nothing, he clearly has suffered no injury, and would be entitled to no more than nominal damages for the technical breach; but in every instance where only nominal damages are recoverable, the vendee should be reimbursed for his necessary expenses legitimately incurred in pursuance of the contract. The value of an attorney's services in the examination of the title would, under such circumstances, be a proper item of damages.[3]

The measure of damages in an action for a breach of contract for the exchange of lands, where the plaintiff has conveyed that which he agreed to convey, is the value of the land which, by the contract, he was to receive from the defendant.[4]

§ 4. **Continued — Vendee's refusal.** There are cases, both in England and the United States, where, on the vendee's default, the vendor, having offered to perform, has been permitted to recover as damages the whole purchase price. The injustice of such a measure, however, is apparent on its face, for it gives the vendor his land as well as its value, and is not now

158, a somewhat different rule is announced, and the vendee is restricted to such damages as he may have incurred by his expenses in an action for breach of contract, and can only obtain other damages by an action for deceit.

[1] Bush v. Cole, 28 N. Y. 261; Hill v. Hobart, 16 Me. 164; Lewis v. Lee, 15 Ind. 499; Bitner v. Brough, 11 Pa. St. 127. But see Sawyer v. Warner, 36 Iowa, 333.

[2] Springer v. Berry, 47 Me. 330; Gardner v. Armstrong, 31 Mo. 535.

[3] Cockroft v. R. R. Co. 69 N. Y. 201; Bigler v. Morgan, 77 N. Y. 312.

[4] Devin v. Himer, 29 Iowa, 297.

regarded as a correct rule in either country. Indeed actions against the vendee by the vendor for the refusal to complete the contract are not distinguishable, in legal effect, from actions for not accepting goods or merchandise, and are governed mainly by the same rules. The vendor has a right to the fruits of his bargain, and is entitled to compensation for any damage he may suffer by reason of its non-consummation. Hence, if the vendee refuses to receive the deed or pay for the land, the question presented is: To what extent has the vendor been damaged by the diminution in the value of the land or the loss of the purchase money in consequence of such refusal or non-performance? If the vendor, subsequent to the breach, has again sold the land and for a lower sum, he will be entitled to recover as damages the difference between the price contracted for and that which he ultimately received;[1] or, if the property still remains in his possession, but has suffered a diminution in value, the measure of his damages will be the difference between the agreed price and its real value at the time the contract was broken.[2] But, on the contrary, if the land has enhanced in value, and at the time of the breach such value exceeds the purchase price as agreed, nominal damages only could be recovered.[3] If after a partial performance the vendee repudiates the agreement, the foregoing rule would still be applicable, or the vendor might recover the full value of the land, but in either case the value of the partial performance must be deducted therefrom;[4] and in like manner, where the vendee has entered into possession and the vendor has tendered a deed, the measure of damages may be the amount of the purchase price provided by the contract,[5] together with interest from the time of the breach.[6] In this latter event the action partakes somewhat of the nature of the

[1] Adams v. McMillan, 7 Port. (Ala.) 73; Bowser v. Cessna, 62 Pa. St. 148; Webster v. Hoban, 7 Cranch (U. S.), 399.

[2] Gray v. Case, 51 Mo. 463; Gilbert v. Cherry, 57 Ga. 128; Griswold v. Sabin, 51 N. H. 167; Porter v. Travis, 40 Ind. 556; Old Colony R. R. v. Evans, 6 Gray (Mass.), 25; Whiteside v. Jennings, 19 Ala. 791; Wells v. Abernethy, 5 Conn. 227; Wasson v. Palmer, 17 Neb. 330; Findlay v. Keim, 62 Pa. St. 112.

[3] Evrit v. Bancroft, 22 Ohio St. 172.

[4] Day v. R. R. Co. 51 N. Y. 583; Curtis v. Aspinwall, 114 Mass. 187.

[5] Curran v. Rogers, 35 Mich. 221.

[6] Garrard v. Dollar, 4 Jones (N. C.), L. 175.

equitable action for specific performance, and in legal effect is the same as an action brought for the recovery of the purchase money.

It is incumbent on the vendor, in an action for damages for breach of contract, to show that he has been ready and willing or has offered to perform on his part,[1] or that the vendee has done some act which dispenses with a performance; and it will be a sufficient performance or offer to perform on his part, to enable him to maintain the action, that he has tendered to the vendee a sufficient deed.[2]

In the assessment of damages, where the contract price does not form the standard, the actual cash value of the land must be taken, and not its value for a particular purpose or upon a sale upon credit;[3] and if the vendor has resold the land, and no fraud is shown, the price for which he sold it would be *prima facie* evidence of its value at the time of the breach.[4] But while this is always received as evidence in suits by either party, it does not preclude the introduction of other testimony tending to show a different value.[5]

§ 5. Failure to perform collateral agreements. Very frequently the real consideration for the conveyance of land is not a sum of money to be paid, but the performance of some collateral stipulation in connection with the land conveyed, which, it is presumed, will enhance the value of the land retained. Where, in such cases, the vendee neglects or refuses to fulfill his contract by complying with the terms of the collateral agreement, a question is presented which involves many peculiar features. The question does not seem to be difficult of solution, however, and in several instances where it has arisen the rights of the vendor have been recognized and protected.

A deed made in pursuance of a contract of this character usually recites a merely nominal consideration — generally the sum of one dollar — while the real consideration is to be found in the

[1] Burnham v. Roberts, 70 Ill. 19.
[2] Harker v. Cochrane, 36 Iowa, 390.
[3] Lewis v. Lee, 15 Ind. 499.
[4] Springer v. Berry, 47 Me. 330.
[5] Adams v. McMillan, 7 Port. (Ala.) 73. Thus, the value may be shown by proof of the value of adjoining lands, even though of a different quality, leaving the jury to determine the difference in value. White v. Hermann, 51 Ill. 243.

collateral agreement, which in many instances rests entirely in parol. But, as a rule, there can be no pretense that the land was really sold for an actual consideration of one dollar; and the true consideration may be shown by parol for the purpose of proving a breach of the contract and as a basis for the estimation of damages. It would seem at first blush that where the real consideration for a conveyance consists of a collateral agreement which is not performed, that, inasmuch as the consideration has failed, the measure of damages would be the value of the land conveyed; and this view has received some recognition. But it has been held that where the true motive of the contract consists in the performance of a collateral stipulation which is not done, the inquiry should be directed to the ascertainment of what damages the vendor may have sustained by reason of his not receiving the actual consideration. It may be, it is said, that the value of the land is greater than the loss sustained by the vendor by reason of the non-performance of the agreement, and if that is so, then his damages would be no greater than the value of this loss; on the other hand, it may be that the loss is greater than the mere value of the land taken, and in that case, also, the damages to be recovered must be the value of the loss. In other words, whatever injury may have been inflicted upon the vendor by not giving him the actual consideration for which he bargained will be the measure of his damage, whether it be much or little. If, therefore, the collateral stipulation refers to improvements or erections to be made on the land conveyed, and if such erections would impair the value of the vendor's adjacent land to the amount of the value of the land conveyed, his damages for non-performance would be merely nominal; if such erections would enhance the value of his adjacent land, the injury sustained by non-performance would be justly measured by the extent of such enhancement, if it can be fairly ascertained by testimony.[1]

[1] In a case where a parol agreement was made, under the terms of which a piece of land was to be conveyed to a railroad company in consideration partly of a freight-house being built on it by the company, in pursuance of which a deed of the property was executed and delivered, *held*, that the deed was a part execution of the contract, and that the measure of damages was the injury sustained by the grantor by reason of

§ 6. **Illegality precludes recovery.** It must be understood, however, that the remarks of the foregoing paragraphs refer only to contracts unobjectionable in themselves, for it is well settled that all illegal executory contracts are void; and as no court will permit its aid to be invoked for their enforcement, neither will they assist either party in an action to recover damages for their non-execution.[1] The policy of the law is to leave the parties, in all such cases, without remedy against each other.[2]

§ 7. **Mutuality.** The rule is general that, in an action at law to recover damages for the breach of an alleged contract, in all cases the contract must bind both parties.[3] Neither party should be in a position where he can hold the other party to the contract and compel its performance if advantageous to him, and at the same time be at liberty to avoid the contract on his part if disadvantageous. In other words, both parties should be bound or neither should be bound.[4] This rule is often invoked in equity in actions for specific performance, but in its practical application an entire harmony of authority is wanting.

§ 8. **Deceit or fraud — False representations.** Fraudulent misrepresentations of material facts relating to the nature, quality, quantity, situation or title of the property sold will constitute sufficient ground to sustain an action at law for damages, provided it can be shown that their falsity was known to the party making them,[5] or that he had reason to believe that they were false;[6] or that he assumed to have, or intended to convey the impression that he had, actual knowledge of their truth, though in fact conscious that he had no such knowledge.[7] It is necessary, in all cases, to show that

the non-erection of the freight-house, and not the value of the land. Westchester, etc. R. R. v. Broomall, 3 Atl. Rep. (Pa.) 444.

[1] Ware v. Jones, 61 Ala. 288.

[2] Myers v. Meinrath, 101 Mass. 367.

[3] Dodge v. Hopkins, 14 Wis. 630; Townsend v. Corning, 23 Wend. (N. Y.) 435.

[4] Lowber v. Connit, 36 Wis. 183.

[5] Wilcox v. Wesleyan University, 32 Iowa, 367; Porter v. Wilson, 35 Ind. 348; Mahurin v. Harding, 28 N. H. 128; Case v. Boughton, 11 Wend. (N. Y.) 106; Page v. Bent, 2 Met. (Mass.) 374.

[6] Stone v. Covell, 29 Mich. 359; Litchfield v. Hutchinson, 117 Mass. 195; Hubbell v. Meigs, 50 N. Y. 480.

[7] Meyer v. Amidon, 45 N. Y. 169; Cabot v. Christie, 42 Vt. 121; Nowlin v. Snow, 40 Mich. 699; Harding v.

such representations were fraudulently made; but, notwithstanding the earlier cases, it is not indispensable that the party making them should at the time have known them to be false. Whether a party misrepresents a fact knowing it to be false, or makes the assertion without any precise knowledge on the subject, is immaterial; the affirmation of what one does not know or believe to be true is equally as unjustifiable as the affirmation of what is known to be positively false; and for this reason a statement of matters as facts, without knowledge as to their truth, is considered as equivalent to a knowingly false statement.[1] It is sufficient that the statements are made recklessly, without knowledge of their truth, and for the purpose of influencing the other party to make the purchase, and having operated to that other's prejudice, and to the gain of the party making them, he must answer in damages.

In such cases, however, there must be the clearest proof of the false representations. The essential element to sustain the action is the intent to deceive or defraud,[2] and the facts necessary to establish the fraudulent intent must be averred and proved affirmatively by the party who alleges or relies upon it.[3]

Randall, 15 Me. 332; Fisher v. Mellen, 103 Mass. 503; Woodruff v. Garner, 27 Ind. 4; Welsh v. Morse, 80 Mo. 568. In a suit against the vendor of land to recover on the ground of false and fraudulent representations made by him as to the nature and quality of the land, where the vendor has never seen the land, it is competent for him to prove that the person from whom he purchased made similar representations to him, as tending to show the statements made by him were not made recklessly and without any ground of belief in their truth. Merwin v. Arbuckle, 81 Ill. 501.

[1] Cole v. Cassidy, 138 Mass. 437; Bower v. Fenn, 90 Pa. St. 359; Juzan v. Toulmin, 9 Ala. 662; Welsh v. Morse, 80 Mo. 568; Budlong v. Cunningham, 11 Ill. App. 28.

[2] Weed v. Case, 55 Barb. (N. Y.) 634; Marsh v. Falker, 40 N. Y. 562. It is sufficient that plaintiff proves the statement, its falsity, and the circumstances under which it was made, tending to show a reckless assertion, in entire ignorance of the fact, and defendant then has the burden of showing his belief in the truth of the representation. Plaintiff is not required to give direct evidence of a deceitful intent. Griswold v. Gibbie (Pa.), 17 Atl. Rep. 673.

[3] Beatty v. Fishell, 100 Mass. 448; Kline v. Horine, 47 Ill. 430; Langdon v. Green, 49 Mo. 363. In an action against one for fraudulent representations in the sale of land, evidence that the defendant made similar representations to other parties the previous year in reference to the same land is not admissible. To make such statements competent as showing the *quo animo* of the defendant, they must have been made near the time of the transaction in

Fraud can never be assumed without proof,[1] nor can it be inferred from mere grounds of suspicion;[2] yet positive and direct evidence is not usually required, and it may be, and usually is, established by proving circumstances from the existence of which a fraudulent intent is a natural and irresistible inference.[3] Again, in order to recover in an action for false representations, it is incumbent on the plaintiff to show that there was not merely a technical error of statement but a substantial misrepresentation.[4] The mere expression of opinion, no assertion of fact being involved, does not, although the opinion be incorrect, render the person expressing it liable for false representations;[5] and the same rule will apply concerning statements which are true as to matters of fact but untrue as to conclusions drawn therefrom.[6] So, too, the false representation of a matter of intention, not amounting to a matter of fact, though it may have influenced the transaction, is not a fraud at law.[7]

Not only should there be the clearest proof of the false representations, but it must also appear that they were made under such circumstances as to show that the contract was founded upon them.[8] They must have formed an inducement to the purchase,[9] and the complaining party must have relied

question, and must appear to be a part of the general scheme to defraud. Johnston v. Beeney, 5 Ill. App. 601. And see Mitchell v. Deeds, 49 Ill. 416.

[1] Farmer v. Calvert, 44 Ind. 209.

[2] Shinn v. Shinn, 91 Ill. 477.

[3] Hiner v. Richter, 51 Ill. 299; Waddingham v. Loker, 44 Mo. 132; Farmer v. Calvert, 44 Ind. 209; Simonton v. Bacon, 49 Miss. 582; Hopkins v. Sievert, 58 Mo. 201; Cole v. Cassidy, 138 Mass. 437; Tucker v. White, 125 Mass. 344; Cooper v. Schlesinger, 111 U. S. 148; Bower v. Fenn, 90 Pa. St. 359.

[4] Sheriff v. Hull, 37 Iowa, 174.

[5] Banta v. Savage, 12 Nev. 151; Tuck v. Downing, 76 Ill. 71; Holbrook v. Conner, 60 Me. 578; Parker v. Moulton, 14 Mass. 99. False representations concerning the value of the land, or its condition or adaptation to a particular use, being merely matters of opinion and estimate, are not actionable, unless the purchaser has been fraudulently induced to forbear inquiry as to their truth; and in such case the means by which he has been thus induced to forbear inquiry must be specifically pleaded.

[6] Stevens v. Rainwater, 4 Mo. App. 292.

[7] Gage v. Lewis, 68 Ill. 604. This is a very instructive case on the question of false representations of intentions.

[8] Langdon v. Green, 49 Mo. 363; Jenkins v. Long, 19 Ind. 28.

[9] Budlong v. Cunningham, 11 Ill. App. 28.

upon them and been deceived thereby.[1] Hence, if he had knowledge of the truth, or even without knowledge he placed no reliance upon the representations, he can hardly be said to have been deceived — the injury, if any result, being rather produced by the error of his own judgment.[2]

Where parties are led to purchase lands by representations which prove untrue, the measure of damages will ordinarily be the difference between the value of the land as it is and what its value would have been if its condition and quality had been as represented.[3]

§ 9. **Continued — Fraudulent concealment.** Fraud may consist as well in the concealment of the truth as in a false suggestion; for the suppression of fact in a matter material to be known in a transaction pending is, both at law and in equity, equivalent to the assertion of a falsehood.[4] It would seem, however, that to constitute fraud in this respect there must be something more than a mere failure to communicate facts within the vendor's knowledge — that is, there must be a positive concealment, as, by withholding information when asked for, or by using some device to mislead, thus involving act and intention;[5] or the suppressed facts must be such that, under the circumstances, the party so concealing them is bound in conscience and duty to disclose them to the other party, and in respect to which he cannot innocently be silent.[6]

§ 10. **False statements without fraud.** Statements by a vendor to a purchaser as to matters of opinion or judgment respecting the property sold do not, in the absence of any relations of trust or confidence, constitute a fraud, although

[1] Lynch v. Mercantile Trust Co. 18 Fed. Rep. 486; James v. Hodsden, 47 Vt. 127; Shackelton v. Lawrence, 65 Ill. 175; Bennett v. Judson, 21 N. Y. 238; Gruby v. Sluter, 44 Md. 237; Jenkins v. Long, 19 Ind. 28.

[2] Tuck v. Downing, 76 Ill. 71; Hogee v. Grossman, 31 Ind. 223.

[3] Page v. Wells, 37 Mich. 415; Estell v. Meyers, 54 Miss. 174; Drew v. Beal, 62 Ill. 164; Krum v. Beach, 96 N. Y. 398.

[4] Aortson v. Ridgway, 18 Ill. 23; Ruffner v. Ridley, 81 Ky. 165.

[5] Kohl v. Lindley, 39 Ill. 195; Watson v. Riskamere, 45 Iowa, 233; Coleman v. Burr, 93 N. Y. 31. This is the rule usually followed in sales of personal property; and the distinction in such cases seems to be that the seller may let the buyer cheat himself *ad libitum*, but must not actively assist him in cheating himself. See 1 Pars. on Cont. 461.

[6] Connover v. Wardell, 7 C. E. Green (N. J.), 498. The subject is further discussed in ch. XXXI, *supra*, § 17.

known by the vendor to be false;[1] yet the representations of a vendor who has been in the actual occupancy and use of the land, and purports to speak from actual results and observation, so far combine matters of fact with matters of opinion that a purchaser is justified in placing some reliance on them;[2] and where, in addition thereto, the purchaser is a stranger to the locality and unacquainted with the peculiarities or conditions of the country where the land is situated, such representations, while not made with any fraudulent intent, if untrue, may properly form the basis of an action for damages. The representations in such case are regarded in the light of warranties.[3]

§ 11. False representations as to value. Mere statements of the vendor as to the value of his land, however false, are not of themselves such evidences of legal fraud as will authorize a recovery of damages in an action for deceit,[4] for value is a matter of judgment and estimation about which men may

[1] Wise v. Fuller, 29 N. J. Eq. 257.

[2] Wright v. Wright, 37 Mich. 55.

[3] So held in a case where a purchaser of a river plantation, being a stranger to the region and unacquainted with the peculiarities of the river, relied in making his purchase on representations of the vendor, an old resident, as to frequency and extent of overflow, which representations were untrue, although they were not made fraudulently and were not incorporated in the contract. It was further held that the damages recoverable in favor of a purchaser for misrepresentations or breach of warranty of the character of the land and qualities in respect to its liability to overflow are the difference between the value of the land at the time of purchase, if it had been as represented, and its value at that time as it was subject to overflow; and that the inquiry may in proper cases include such matters as the frequency, extent and duration of the overflows and their effect upon the crops; the deficit or partial loss of the crop by the overflow next after the purchase, reference being had to the character of the season, climatic influences and other circumstances which affected the production; damages sustained by the drowning of his cattle and animals by the first overflow, where the purchaser could not by reasonable efforts have saved them; the expense of repairing fences washed away, removing driftwood, logs and the like, so far as these injuries were caused by the overflow warranted against; compensation for mules that die of disease, without his fault or negligence, if it shall be shown that the disease is directly to be traced to the overflow. Estell v. Myers, 54 Miss. 174.

[4] Kenner v. Harding, 85 Ill. 264; Merwin v. Arbuckle, 81 Ill. 501; Ellis v. Andrews, 56 N. Y. 83; Parker v. Moulton, 114 Mass. 99; Holbrook v. Conner, 60 Me. 578; Morrill v. Wallace, 9 N. H. 115.

and will differ; and where a party is dealing with his own property and trying to effect a sale, he has, it seems, the right to puff the same in the most extravagant manner, and to exalt its value to the highest point his antagonist's credulity will bear.[1] Yet, while it is undoubtedly the rule that representations as to mere value, though known to be false, will not constitute fraud, provided no fiduciary relation subsists between the parties, it is a rule that is to be strictly construed. In its practical operation it is restricted to those who, standing upon equal ground, are supposed to be guided by their own judgments in arriving at a conclusion, and has no application where the purchase is induced by the false representations to the same effect by a third party, effected by a conspiracy between him and the vendor.[2]

If, then, a vendor may overestimate the value of his property for present and visible uses, it follows with much stronger reason that the law does not hold him responsible for the extravagant notions he may entertain of the value of such property dependent upon its future exploitation or the result of future enterprises; nor for expressing them to one acquainted with its general character and condition. The impossibility of showing the overestimate in matters wholly conjectural is perhaps the best reason for the rule; for all opinions of this nature must, from their speculative character, ever continue to be as variant as the individuals who give them utterance. Hence, a statement of opinion assigning a value to property like a mine or a quarry not yet opened is not to be pronounced fraudulent because the property upon subsequent development may prove worthless; although, upon the other hand, it is not to be pronounced honest because the property may turn out

[1] Banta v. Palmer, 47 Ill. 99; Ellis v. Andrews, 56 N. Y. 83; Cronk v. Cole, 10 Ind. 485; Hemmer v. Cooper, 8 Allen (Mass.), 334.

[2] Medbury v. Watson, 6 Pick. (Mass.) 246; Adams v. Seule, 33 Vt. 538. And see Miller v. Barber, 66 N. Y. 558. So held in a case where the vendor represented to a purchaser, who was unacquainted with the value of the land he bought, that he had been offered $1,200 for the same by a certain person, and procured such person to make the same statement to the purchaser, whereby he was induced to buy, and it appeared the offer was a mere pretense, and payable in worthless notes and other property greatly in excess of its value. Kenner v. Harding, 85 Ill. 264.

of much higher value.[1] It would seem, therefore, that whenever property of any kind depends for its value upon contingencies which may never happen, or developments which may never be made, opinion as to its value must necessarily be more or less of a speculative character; and no action will lie for its expression, however fallacious it may prove, or whatever the injury a reliance upon it may produce.[2]

False representations by the vendor as to the price he paid for the property, although positive affirmations of fact, are yet so closely allied to the principles last stated as to come within their operation, and do not, as a rule, constitute an actionable fraud.[3]

Yet while the statements of the foregoing paragraphs undoubtedly present the universally admitted rule of law upon

[1] Gordon v. Butler, 105 U. S. 553; Holbrook v. Conner, 60 Me. 578. In this case the vendor and his agent represented, among other things, that the lands sold by them contained large deposits of oil, and were of great value for the purpose of digging, boring for and manufacturing it; and upon these representations the purchaser acted. The evidence tended to show that the representations were false and fraudulent, and the plaintiff obtained a verdict; but the supreme court set it aside. It appeared that the land had not been tested: and it was unknown to both parties whether it was valuable as oil land, except so far as might be inferred from the production of wells on neighboring lands, and a single well upon the land in question. The court held that under these circumstances the representation was to be regarded as a matter of opinion, and would not support the action. The case of Gordon v. Butler, 105 U. S. 553, was an action for alleged fraud in obtaining a loan of $10,000 upon insufficient security. The mortgaged land was supposed to contain quarries of stone valuable for building and other purposes, but not opened sufficiently to show their extent or value; an estimate was placed upon the land as containing such quarries, which upon further development proved very erroneous; but the supreme court of the United States, where the case came for final review, followed the doctrine of the case last stated, holding that the estimate of value was nothing more than conjectural opinion, which, whether true or false, constituted no legal cause of complaint.

[2] Gordon v. Butler, 105 U. S. 553.

[3] Richardson v. Noble, 77 Me. 390. Thus, where a vendor falsely asserted that his property had cost $10,000, and that he had given his obligation for that sum for it, there being no relation of trust or confidence between him and the vendee, this was held not to be material or so important as to constitute a fraud in legal contemplation, and that the vendee was not entitled to a rescission or to recover the difference between what he agreed to pay and what it actually cost the vendor. Tuck v. Downing, 76 Ill. 71.

the subject, it should nevertheless be remembered that all statements by a vendor as to the value of his property are not mere matters of opinion. They may be, under certain circumstances, affirmations of fact. If he, knowing them to be untrue, makes them with the intention of misleading the vendee, and if the latter, relying upon them, is misled to his injury, it has been held that a substantial right to recover damages is created, or the vendee may, at his option, avoid the contract.[1] To effect this, however, the representations must as a rule be coupled with other circumstances; as where they are fraudulently made of particulars in relation to the estate which the vendee has not equal means of knowing, and where he is induced by the vendor's artifice to forbear inquiries which he would otherwise have made;[2] but whether a representation as to value is merely an expression of opinion or belief, or an affirmation of fact to be relied on, is a question for the jury, and should properly be left to their decision.[3] Again, while the purchaser must rely upon his own judgment in questions of value, yet in regard to any extrinsic facts affecting the quality or value of the subject of the contract he may rely upon the assurances of the vendor; and if he does so rely, and those assurances are fraudulently made to induce him to enter into the contract, he may maintain an action for the injury sustained.[4]

§ 12. False representations as to appurtenances. Where a person has been induced to purchase land upon the false and fraudulent representation that certain privileges were annexed thereto,[5] even though the same are not mentioned in the writ-

[1] Simar v. Canaday, 53 N. Y. 298; Van Epps v. Harrison, 5 Hill (N. Y.), 63.

[2] Medbury v. Watson, 6 Met. (Mass.) 216; McClellan v. Scott, 24 Wis. 81; Van Epps v. Harrison, 5 Hill (N. Y.), 63. And see Croyle v. Moses, 90 Pa. St. 250; Neidefer v. Chastain, 71 Ind. 363; Graffenstein v. Epstein, 23 Kan. 443.

[3] Simar v. Canaday, 53 N. Y. 298.

[4] Ellis v. Andrews, 56 N. Y. 83.

[5] As where the vendor, for the purpose of inducing the vendee to purchase and to enhance the value of the land, fraudulently represented that as the owner of certain land he had by the laws of the state the privilege of having a grant or patent for land under water adjoining the land to be sold, and that if vendee would purchase he would assist him in obtaining a grant of such submerged land. It transpired, however, that such submerged land had many years before been patented to another, and that vendor, in any event, would not be entitled to it. *Held* that, if no repre-

ten evidences of the sale or included in the deed, an action for deceit will yet lie, if by reason of such representations the purchaser has been materially injured.

§ 13. **False representations as to the condition of the property.** Ordinarily where parties negotiate for the sale of land they are presumed to do so with the property in view;[1] and where such is in fact the case, representations as to the character of the land or the condition of improvements placed upon it will not render the vendor liable in the absence of fraud, fraudulent concealment or warranty.[2] But where the representations are of facts the existence of which are not open and visible, and of which the party making the representations has superior means of knowledge, if the statements are made without qualification they may, if false, be properly regarded as fraudulent misrepresentations, notwithstanding the person making them may have believed his statements to be true.[3] The theory upon which this doctrine is sustained is that in actions of deceit the charge of fraudulent intent is maintained by proof of a statement made as of the party's own knowledge which is false, provided the thing stated is not merely matter of opinion, estimate or judgment, but is susceptible of actual knowledge; and in such case it is not necessary to make any further proof of an actual intent to deceive. The fraud, it is contended, consists in stating that the party knows the thing to exist when he does not know it to exist; and if he does not know it to exist, he must ordinarily be deemed to know that he does not. Forgetfulness of its existence after a former knowledge, or a mere belief of its existence, will not warrant

sentations had been made on the subject by the vendor, both parties would have been equally chargeable with a knowledge of the law and the public records of the state; but the vendor having knowingly and falsely misrepresented the fact with respect to the situation of the land under water, and the principal inducement with the vendee to purchase being to obtain the water privilege for the purpose of erecting docks, etc., and the value of the land without this privilege being greatly diminished, the vendor was chargeable with all damages resulting from such false representation, which in this case was held to be the difference between the actual value of the land conveyed and the amount which vendee was induced to pay by reason of the fraudulent representation. Monell v. Colden, 13 Johns. (N. Y.) 395.

[1] French v. Carhart, 1 Comst. (N. Y.) 107.

[2] Harsha v. Reid, 45 N. Y. 415.

[3] Milliken v. Thorndike, 103 Mass. 382.

or excuse a statement of actual knowledge.[1] This doctrine, while not fully maintained in all of the states, is recognized and steadily adhered to in many,[2] and has also found support in the federal courts.[3]

§ 14. False representations as to quantity. A purchaser of land has a right to rely upon the representations and assertions of the vendor relative to the extent and boundaries of the tract, and so relying is under no obligation to make any further examination or to consult the recorded plat.[4] The law presumes that the owner knows his own property and that he truly represents it; and if the purchaser, trusting to the owner's statements, is misled to his injury, an action will lie if the representation is false.

If the vendor fraudulently represents the number of acres to be greater than the actual number conveyed, and thereby induces the vendee to give more for the tract than he otherwise would, the vendee is entitled to an abatement or to compensation for the deficiency by way of damages.[5] The manner in which the property is described may have some bearing on the question of damages, however; and if the sale was intended to be in gross, without reference to the number of acres contained, the fact of misrepresentation becomes less important.

§ 15. Failure to assign insurance policy. One of the most common incidents to sales of improved property is a subsidiary agreement to assign the policies of the insurance thereon, and for a failure to comply with this agreement damages will lie as in other cases of breach. A contract to assign a policy, however, is not a contract of insurance but of sale, and the measure of damages for the breach of it would be the value of the thing sold. A sum that would procure a similar policy, and thus place the vendee in the position he would have occupied had there been no breach of contract, would be a proper

[1] Chatham Furnace Co. v. Moffatt, 147 Mass. 403.

[2] See Bower v. Fenn, 90 Pa. St. 359; Cole v. Cassidy, 138 Mass. 437; Logan v. Logan, 22 Fla. 561.

[3] Cooper v. Schlesinger, 111 U. S. 148.

[4] Porter v. Fletcher, 25 Minn. 493; Newell v. Horn, 45 N. H. 421; Lynch v. Mercantile Trust Co. 18 Fed. Rep. 486; Maggart v. Freeman, 27 Ind. 531; Elliot v. Boaz, 9 Ala. 772; Cabot v. Christie, 42 Vt. 121. But see Credle v. Swindell, 63 N. C. 305; Mooney v. Miller, 102 Mass. 217.

[5] Melick v. Dayton, 34 N. J. Eq. 245.

measure of damages, and all that the vendee could claim; nor can he elect to go without insurance and hold the vendor as insurer. The natural consequences of the failure of the vendor to perform would be that the vendee would procure another policy of insurance, but should he fail so to do he cannot charge the vendor with the consequences of his neglect; and should damage result from the burning of the building, such damage could not be considered as the direct and natural consequence of the breach of the vendor's contract, nor as having been contemplated by the parties as included in it.[1]

§ 16. **Waste.** A vendor in possession is under no duty to his vendee to keep the premises in repair or to preserve them from deterioration pending the consummation of the purchase, and is not liable for any injury that may befall them not attributable to his own misconduct. At the same time he has no right to commit waste or spoliation either by cutting timber or removing any of the natural or artificial increment of the land, and should he do so he may be called upon to pay or account to the purchaser for the value thereof. It has been said that this liability of the vendor results from the principle that in equity everything which forms a part of the inheritance belongs to the purchaser from the date of the contract. And so it has been held that inasmuch as the purchaser is deemed in equity to be the owner of the land, a court of equity will, in an action for specific performance, adjust the respective rights and liabilities of the parties on this assumption, and award damages by way of compensation for the loss or injury sustained.

The damages for waste committed by a vendor pending a contract of purchase may be measured by the injury to the inheritance occasioned thereby or by the value of the articles

[1] The defendant sold a house to the plaintiff, and agreed to assign to her a policy of insurance he held upon it. He did not assign it, although several times requested by the plaintiff, but promised to do so, and gave some excuse for not having done it. The plaintiff procured no insurance upon the house. Nearly six months after the conveyance, and about three weeks after the last demand upon the defendant for an assignment, the house was injured by fire. *Held*, that the plaintiff could not recover damages resulting from the burning of the house, nor for other damages more than it would have cost to procure insurance for the unexpired term of the policy. Dodd v. Jones, 137 Mass. 322.

taken from the premises. In most cases the deterioration in the value of the land would be an appropriate method of fixing the amount of the injury, and in some cases it would be the only way in which adequate compensation could be given in view of the nature of the injury. Thus, where trees designed for shade and ornament have been cut down, or where soil, having little or no value separated from the land, has been stripped from it, so as to render it less productive or fit for use, the diminished value of the land would be the only just measure of compensation. But if this were the only measure of compensation it would in many cases practically exempt the wrong-doer from responsibility. Thus, the cutting of a few trees from a timber lot, or taking a few hundred tons of coal from a mine, might not in any appreciable manner diminish the market value of the lot or the mine, and yet the value of the wood or coal so severed from the estate might be considerable. In such event the measure of damages should be the value of the wood or coal; and the wrong-doer should not be permitted to shield himself by showing that the property from which it was taken was, as a whole, worth as much as it was before.[1]

§ 17. **Injuries to lands.** It would seem that a contract purchaser of lands who has acquired no possessory rights cannot, at least before he has fulfilled all the conditions of his contract and become absolutely entitled to a conveyance, maintain an action for injuries to the freehold, as such right inures only to the legal owner of the land. Hence, he would have no right to bring an action for a trespass upon the lands.[2]

§ 18. **Deprivation of possession.** A purchaser under an executory contract may not demand possession as a matter of legal right; nor will an action at law lie for the deprivation of the same pending the consummation of the contract. Yet as such denial may in many cases work a positive injury, equity

[1] Worrall v. Munn, 53 N. Y. 185.

[2] And it seems that, where such contract purchaser has brought such action, a deed subsequently executed by his vendor upon an anticipated payment cannot operate by way of relation to the date of the contract, so as to transfer to such purchaser, for the purpose of saving his suit, the right of action for such trespass, which, when the suit was brought, belonged to the vendor. Moyer v. Scott, 30 Mich. 345.

will permit a recovery of damages sustained thereby as additional relief in an action for specific performance. Where the vendor retains the possession of the land sold and refuses to deliver it according to his contract, equity will adjust the rights of the parties in furtherance of complete justice between them. If the purchase money has not been paid the vendee may elect to pay interest on the purchase money during the time he has been wrongfully deprived of the possession, and take the rents and profits received or which might have been received by the vendor during the same time, or he may allow the vendor to retain the rents and profits, and in such case he will be exempted from the payment of interest. Where the vendor has received payment of the purchase money, yet retains possession of the land and refuses to deliver it as provided by the contract, he cannot reap the benefit of the contract while thus retaining possession. The vendee, in such case, will be entitled to interest on the purchase money paid by him as damages for being kept out of possession, and will not be limited to the rental value of the land for ordinary uses.[1]

§ 19. As affected by limitation. The general rules which regulate and govern the right to sue for damages apply generally and with the same effect, where the right grows out of a transaction concerning real estate, as to other matters. No distinction is usually made and none should be. But the decisions seem to render a brief allusion to this topic proper at this time and in connection with the general subject of the chapter. Thus, the statute will not ordinarily run in case of fraud until the discovery of the fraud by the aggrieved party;[2] but it has been held that a cause of action to recover damages for fraudulent representations made upon a sale of land[3] accrues, and the statute of limitations begins to run, the moment the bargain is completed by the conveyance of the premises to the purchaser; that it is of no consequence whatever that the purchaser did not discover the fraud within six years; and

[1] Worrall v. Munn, 53 N. Y. 185.

[2] Ryan v. Doyle, 31 Iowa, 53; Andrews v. Smithwick, 34 Tex. 544.

[3] In this case in regard to incumbrances.

that it is the act of misrepresentation and not the resulting damages which constitutes the cause of action.[1]

The statute of limitations applies with the same force, and has the same effect with respect to claims and demands attempted to be set off in an action, as to those upon which the suit was instituted; and where the claim is barred by limitation it is not available by way of counter-claim or recoupment.[2] But where the bar of the statute had not matured when the original suit was commenced, its institution will stop the operation of the statute, and the matter pleaded as a set-off will not become barred afterward during the pendency of that action.[3]

§ 20. Penalties and liquidated damages. Perhaps no branch of the law is involved in more obscurity, by reason of conflicting and contradictory decisions, than that which relates to the operation and effect to be given to the sum named in an agreement to secure its performance, and the determination of the question as to whether such sum shall be treated as liquidated damages or simply as a penalty. In this as in matters of like character, the authorities are unanimous in agreeing that the question should be determined in accordance with the manifest intention of the parties;[4] but it is the difficulty which is usually experienced in ascertaining this intention that has given rise to so many conflicting cases. Numerous rules have been formulated by judges and text-writers, based upon the decided cases, for the ascertainment of this question of intention; but as each case must, in a large measure, depend upon its own peculiar and attendant circumstances,[5] a large proportion of such rules are seldom of any practical utility. A few general principles, however, may be regarded as definitely settled; and from these it would seem that where the parties

[1] Northrop v. Hill, 61 Barb. (N. Y.) 136.

[2] Harwell v. Steele, 17 Ala. 372; Lyon v. Petty, 65 Cal. 322; De Lavalette v. Wendt, 75 N. Y. 579.

[3] Stillwell v. Bertrand, 22 Ark. 375; Dunn v. Bell, 85 Tenn. 582; Brumble v. Brown, 71 N. C. 513; McElwig v. James, 36 Ohio St. 152.

[4] Peine v. Weber, 47 Ill. 41; Haughton v. Pattee, 58 N. H. 326; Dakins v. Williams, 17 Wend. (N. Y.) 447; Perkins v. Lyman, 11 Mass. 76; Streeper v. Williams, 48 Pa. St. 450.

[5] Jones v. Binford, 74 Me. 439; Mathews v. Sharp, 99 Pa. St. 560; Haughton v. Pattee, 58 N. H. 326.

to an agreement have expressly declared the sum named to be intended as a forfeiture or penalty, and no other intent is to be collected from the instrument, it will generally be so treated, and the recovery will be limited to the damages sustained by the breach of the covenant it was to secure.[1] On the other hand, it will be inferred the parties intended the sum named as liquidated damages where the damages arising from the breach are uncertain and are not capable of being ascertained by any satisfactory and known rule, or where, from the nature of the case and the tenor of the agreement, it is apparent the damages have already been the subject of actual and fair calculation and adjustment.[2]

Parties may agree upon any sum as a compensation for the breach of the contract which does not manifestly exceed the amount of the injury suffered,[3] yet the fact that parties do fix a sum to be paid and call it liquidated damages does not make it so;[4] nor will it always control the question as to the measure of the recovery.[5] The tendency of the courts has been to lean strongly toward that construction which excludes the idea of liquidated damages, and to permit recoveries of actual damages only;[6] and to that end will look to see the nature and purpose of fixing the damages to be paid.[7] If the clause fixing the amount of damages appears to have been inserted to secure prompt performance it will be treated as penalty, and

[1] Tayloe v. Sandiford, 7 Wheat. (U. S.) 13; Ricketson v. Richardson, 19 Cal. 330; Hammer v. Breidenbach, 31 Mo. 49; Colwell v. Lawrence, 38 N. Y. 71.

[2] Gobble v. Linder, 76 Ill. 157; Williams v. Dakin, 22 Wend. (N. Y.) 201; Morse v. Rathburn, 42 Mo. 594; Streeter v. Rush, 25 Cal. 67; Cushing v. Drew, 97 Mass. 445.

[3] Scofield v. Tompkins, 96 Ill. 190; Perkins v. Lyman, 11 Mass. 76; Gomer v. Saltmarsh, 11 Mo. 271; Williams v. Vance, 9 S. C. 344; Louis v. Brown, 7 Or. 326.

[4] Wheatland v. Taylor, 29 Hun (N. Y.), 70; Davis v. Freeman, 10 Mich. 188; Streeper v. Williams, 48 Pa. St. 450.

[5] Hahn v. Horstman, 12 Bush (Ky.), 249; Chamberlain v. Bagley, 11 N. H. 234; Durst v. Swift, 11 Tex. 273; Foley v. Keegan, 4 Iowa, 1; Perkins v. Lyman, 11 Mass. 76.

[6] Leggett v. Ins. Co. 53 N. Y. 394; Watts v. Shepard, 2 Ala. 425; Cheddick v. Marsh, 21 N. J. L. 463; Baird v. Toliver, 6 Humph. (Tenn.) 186; Wallis v. Carpenter, 13 Allen (Mass.), 19.

[7] Gillis v. Hall, 7 Phil. (Pa.) 422; Hahn v. Horstman, 12 Bush (Ky.), 249; Brewster v. Edgerly, 13 N. H. 275; Ricketson v. Richardson, 19 Cal. 330.

no more than the actual damages proved can be recovered;[1] but if, in view of the nature of the contract, the difficulty of proving the actual damages, and the language employed, the sum named should be regarded as compensation, courts will usually grant the relief which the parties by their contract have agreed upon.[2] In the construction of the clause technical rules are not regarded,[3] for the question must be determined from all the circumstances of the case that are applicable, as well as from the consideration of principles of law,[4] and hence the whole contract must be looked to: its subject-matter, the ease or difficulty of measuring the breach in damages,[5] and the magnitude of the stipulated sum, compared not only with the value of the subject of the contract, but in proportion to the probable consequences of the breach as well.[6] Where the sum named is treated as liquidated damages it is regarded as a positive debt, and as such excludes the consideration and proof of actual damage;[7] if, upon the contrary,

[1] Henderson v. Cansler, 65 N. C. 542; Lyman v. Babcock, 40 Wis. 503; Nevada Co. v. Hicks, 38 Ark. 557; Davis v. Freeman, 10 Mich. 188; Hallock v. Slater, 9 Iowa, 599; Hammer v. Breidenbach, 31 Mo. 49.

[2] Gobble v. Linder, 76 Ill. 157; Gammon v. Howe, 14 Me. 250; Hardee v. Howard, 33 Ga. 533; Tingley v. Cutler, 7 Conn. 291; Leland v. Stone, 10 Mass. 459; Fisk v. Fowler, 10 Cal. 512; Westerman v. Means, 2 Pa. St. 97.

[3] Haughton v. Pattee, 58 N. H. 326.

[4] Jones v. Binford, 74 Me. 439.

[5] Where a contract specifying one certain sum as liquidated damages contains various stipulations, to all of which the clause as to damages is clearly applicable, such stipulations either varying greatly in their character and importance or being of such a nature that the damages from a breach of some of them could be easily and certainly measured, the latter should be regarded as a penalty, and not as liquidated damages. Carter v. Strom (Minn.), 43 N. W. Rep. 394.

[6] Matthews v. Sharp, 99 Pa. St. 560; Pearson v. Williams, 26 Wend. (N. Y.) 630. Where a contract for the sale of land provided for the payment of $22,000 for the land by a day named, which was made a condition precedent, and time made of the essence of the contract, and that in case of default in payment of the price or any part thereof when due, the vendor might declare the contract null and void and retain any sums of money paid, and might sue and recover from the purchaser the whole or any part of the price that might be due and unpaid as liquidated damages, and nothing was paid and a forfeiture declared, it was held, in an action of covenant upon the agreement to recover the entire price as liquidated damages, that a demurrer was properly sustained to the declaration. Scofield v. Tompkins, 95 Ill. 190.

[7] Brown v. Maulsby, 17 Ind. 10; Hardee v. Howard, 33 Ga. 533.

it is treated as a penalty, no more than the actual damages proved can be recovered.[1]

§ 21. Continued — Non-performance of stipulations. Another phase of the special subject under consideration is presented in cases where land is sold at a reduced price, coupled with certain agreements on the part of the vendee relative to the improvement of the property. In such cases it is common to insert a clause providing for damages in case of the non-fulfillment of the agreed stipulations. Thus, where land is sold for a specified price, and the vendee agrees by a certain day to erect upon the land a building of prescribed dimensions and material, or, in default thereof, to pay to the vendor a specified sum of money, such sum, it has been held, is not to be regarded as a penalty, limiting the vendor to the actual damages he may have sustained by reason of the non-erection of the building, but should be deemed a part of the contract price of the land, and on failure of the vendee to erect the building as agreed the vendor would be entitled to recover the specified sum as liquidated damages.[2]

§ 22. Damages by way of recoupment. Recoupment has been defined as that right of the defendant, in the same action, to claim damages from the plaintiff either because he has not complied with some cross-obligation of the contract upon which he sues, or because he has violated some duty which the law imposed upon him in the making or performance of the same.[3] It is a doctrine essentially equitable in character, and is supposed to have been derived by the common-law courts from the civil law by way of the court of chancery.[4] In its original form it was confined entirely to cases of fraud, but within comparatively recent years its scope has been broadened, so that it now embraces any claim which a defendant may have, growing out of the contract sued on, which goes in reduction of the plaintiff's demand. It is distinguished

[1] Scofield v. Tompkins, 95 Ill. 190.

[2] So held where a purchaser of fourteen city lots covenanted, in consideration of having the property conveyed to him for only $21,000, that he would, by a certain day, erect on the lots two brick houses of specified dimensions, or in default thereof pay to the grantor, on demand, the sum of $4,000. Pearson v. Williams, 26 Wend. (N. Y.) 630.

[3] 2 Bouv. Law Dict. 425.

[4] Wheat v. Datson, 12 Ark. 699; Schuchman v. Knoebel, 27 Ill. 175.

from set-off in that the damages which the defendant seeks to recoup must arise out of the same transaction as the plaintiff's claim, and is not confined to liquidated damages. It is not distinguishable from counter-claim, which is a statutory term, and which is usually but an extension of the remedy of recoupment, except that under the statutes of counter-claim the defendant may generally recover an excess of damages in his own favor, while recoupment, on the contrary, is strictly limited to a mere reduction of the plaintiff's demand.[1] There is a natural equity as to claims arising out of the same transaction that one should compensate the other and that the balance only should be recovered; and it is from the application of this salutary principle of permitting parties to adjust their whole controversy in one action that the doctrine of recoupment has grown.[2]

It is a remedy that is frequently resorted to by the vendee in actions by the vendor to recover the purchase money of the land sold; and if any fraud has been practiced upon him by the vendor in the purchase of the property he may set up damages by way of recoupment.[3] The proper rule regarding the measure of damages in such a case would seem to be, that where fraud upon the part of the vendor induces the purchaser to lay out labor, time and expense, of the fruits of which he is deprived, his injury is to be estimated by the amount of damage he has actually suffered. This, however, would not embrace damages resulting from the loss of profits or the like, but is confined and limited to the direct consequences of the injury sustained.[4] Where the purchaser is allowed to recoup the amount of damage sustained by him, in

[1] Burroughs v. Clancey, 53 Ill. 30; Stow v. Yarwood, 14 Ill. 424.

[2] Schuchman v. Knoebel, 27 Ill. 175; Avery v. Brown, 31 Conn. 401.

[3] James v. Elliot, 44 Ga. 237; Estell v. Meyers, 56 Miss. 800; Reed v. Tioga, etc. Co. 66 Ind. 21.

[4] James v. Elliot, 44 Ga. 237. Where a deed conveyed certain lands, "together with the mill, etc., with the right to raise a dam sufficient to raise the water seven feet high," and covenanted that the grantor was well seized of the "premises," and had good right to convey, etc., if the grantor had not that right the damages sustained by the grantee in consequence of that breach of the covenant are a proper subject of *counter-claim* in an action by the grantor to foreclose a mortgage given for the purchase money. Walker v. Wilson et al. 13 Wis. 522. See, also, to the same effect, Hall v. Gale, 14 Wis. 54.

consequence of the fraud or misrepresentation of the vendor, against a demand for the purchase money, such amount should be deducted from the purchase money as of the day of the purchase.[1]

In the absence of fraud, mistake or warranty, defect or failure of title in the vendor is not available to the vendee to defeat or abate recovery for the purchase money of lands;[2] nor in any event, in actions brought on obligations given for the purchase money, will a defendant who sets up outstanding prior incumbrances or other defects, but does not allege or prove damage to himself thereby, be entitled to a deduction on account of such incumbrances.[3]

In an action brought for the purchase money the vendee may set off or recoup such damages as he may have sustained by reason of being kept out of the possession of the property or for any injury thereto by the vendor;[4] and where the vendor brings his action to foreclose a purchase-money mortgage, the vendee, who had previously received a deed with a covenant of seizin, may set up as a counter-claim a breach of such covenant, and have his damages set off against the vendor's demand.[5] So, also, in an action by the vendee upon the covenants, the vendor may set up and recoup the unpaid purchase money or notes given to represent the same.[6]

§ 23. Compensatory damages in equity. As has been stated, it is a settled principle of equity not to entertain bills for compensation or damages, except as incidental to other relief, whenever the contract is of such a nature as to afford an adequate remedy at law. But where no such remedy exists a ground is furnished for equitable interference, and the injured party is permitted to invoke its aid to protect himself from fraudulent advantage or prevent an irreparable injury.[7]

[1] Estell v. Meyers, 56 Miss. 800.

[2] Tobin v. Bell, 61 Ala. 125.

[3] Evans v. McLucas, 12 S. C. 56.

[4] Fetternecht v. McKay, 47 N. Y. 426.

[5] Lawry v. Hurd, 7 Minn. 356; Scantlin v. Allison, 12 Kan. 85.

[6] Beecher v. Baldwin, 55 Conn. 419.

[7] Hatch v. Cobb, 4 Johns. (N. Y.) 559; Andrews v. Brown, 3 Cush. (Mass.) 130; Woodman v. Freeman, 25 Me. 531. As where there has been a part performance of a parol contract for the purchase of lands, and the vendor has since sold the same to a *bona fide* purchaser for a valuable consideration without notice, in such a case a decree for specific performance would be ineffectual, and

So, too, while equity will not entertain jurisdiction where the sole object of the bill is to obtain compensation for the breach of a contract, except where the contract is of purely equitable cognizance, it may and will retain jurisdiction, in a proper case, for the purpose of preventing a multiplicity of suits, and, if other relief would be unavailing, award damages by way of compensation.[1] This is now the settled doctrine, and the tendency of modern decisions has been to enlarge rather than restrain it.[2]

This phase of the subject finds some of its best illustrations in cases where by reason of fraud or through gross mistake more or less land has been conveyed than the vendor contemplated to part with or the vendee to receive. Equitable relief will in such cases be afforded to the injured party, and as a part of such relief compensation may be decreed for either a surplus or deficit.[3] So, also, in suits for specific performance where for some reason performance becomes impracticable, equity may retain the bill and grant compensation by way of damages.[4]

§ 24. Damages for breach of a parol agreement. It may be stated generally that no action will lie to recover damages resulting merely from the violation of a parol agreement to convey. Upon this point there is no controversy, and the law, in the enforcement of the rule, is rigid and unyielding.[5] There

the breach of the contract being by parol would give no remedy at law for compensation or damages; hence a foundation is furnished for the exercise of equity jurisdiction. See Story, Eq. Jur. § 798; Willard's Eq. Jur. 201; Fry, Spec. Perf. *345; Berryman v. Hewitt, 6 J. J. Marsh. (Ky.) 462.

[1] As where the vendor has deprived himself of the power to perform his contract specifically, by disposing of the land to another during the pendency of a suit to compel performance; compensatory damages may in such case be awarded for such non-performance, and equity will retain jurisdiction for this purpose. Moss v. Elmdorf, 11 Paige (N. Y.), 277; Woodcock v. Bennett, 1 Cow. (N. Y.) 711; Renkin v. Hill, 49 Iowa, 270; Woodman v. Freeman, 25 Me. 531; Rockwell v. Lawrence, 6 N. J. Eq. 190; Aday v. Echols, 18 Ala. 353.

[2] Pratt v. Law, 9 Cranch (U. S.), 494; Doan v. Mauzey, 33 Ill. 227; Scott v. Billgery, 40 Miss. 119; Hill v. Fiske, 38 Me. 520; Aday v. Echols, 18 Ala. 353; Rider v. Gray, 10 Md. 282; Leach v. Forney, 21 Iowa, 271.

[3] O'Connell v. Duke, 29 Tex. 299; Wright v. Young, 6 Wis. 127.

[4] Hazelrig v. Hutson, 18 Ind. 481; Longworthy v. Mitchell, 26 Ohio St. 334; Presser v. Hildebrand, 23 Iowa, 483.

[5] Welch v. Lawson, 32 Miss. 170.

is an ancient English *dictum* to the effect that as it is settled in equity that a part performance takes the contract out of the operation of the statute of frauds, the same rule should hold at law;[1] but this has since been denied by the courts of England and never seems to have found acceptance in this country.[2] Indeed there seems to be no difference, on principle, between a contract wholly executory or partly executed, so far as the right of recovery in damages is concerned. The rule permitting or enforcing a specific performance of a verbal contract in cases of partial performance is strictly of equitable cognizance, and was instituted solely to prevent the fraud made possible by a rigid adherence to the statute, and although universally recognized and followed in equity it has no effect at law to take a case within the statute out of its provisions.[3]

It does not follow, however, that the parties to a parol sale are entirely remediless in case of a breach of contract; for, while a mere failure to perform is not usually such a fraud as will sustain an action, even in a case where the parties are fully able, yet it is a well-settled and salutary principle of law that every man is bound to the observance of good faith to the extent that he knows that he is trusted, and must so act as not to injure another by his conduct. Hence, while no action can be sustained to recover damages for the loss of land or bargain on the breach of a parol agreement, yet parties who have entered into the same in good faith may still be entitled to compensation for loss or injury thereby incurred, and may recover the same in a court of law.[4]

The measure of damages for breach of a parol contract to convey land is the consideration paid and compensation for improvements made in reliance on the contract, deducting a reasonable rental of the premises, except when there has been fraud on the part of the vendor in the original contract.[5]

[1] Brodie v. St. Paul, 1 Ves. Jr. (Eng. Ch.) 326.

[2] Jackson v. Pierce, 2 Johns. (N. Y.) 222.

[3] Lane v. Shackford, 5 N. H. 130; Thompson v. Gould, 20 Pick. (Mass.) 134; Hunt v. Coe, 15 Iowa, 197; Johnson v. Hanson, 6 Ala. 351; Eaton v. Whitaker, 18 Conn. 231; Hubbard v. Whitney, 13 Vt. 21; Patterson v. Cunningham, 12 Me. 512.

[4] Welch v. Lawson, 32 Miss. 170; Boyd v. Stone, 11 Mass. 342.

[5] Harris v. Harris, 70 Pa. St. 170.

Art. II. On the Covenants.

§ 1. General principles.
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19. Parol evidence of warranty.

§ 1. General principles. By the ancient feudal constitution, if the vassal's title to the fee which he had received at the hands of his lord, and for which he was to render certain duties, failed, he had a right to call upon his lord, in a proper form of action, for other lands of equal value. As a substitute for this ancient right we now have the modern personal covenants contained in deeds, only, that instead of other lands the grantee recovers upon his covenants damages for the land from which he was ousted or to which his title fails. The general nature of covenants for title have never changed, however; and though their form, method of application, enforcement, etc., have passed through many mutations, they are still, for all practical purposes, simply assurances of protection and indemnification. They are sometimes raised by law as an implication, but more generally are express declarations inserted in conveyances for the purpose of securing to the grantee the benefit of the title which he assumes to purchase and which his grantor professes to convey.

A covenant has been defined as an agreement between two or more persons, entered into by deed, whereby one of the parties promises the performance or non-performance of certain acts, or that a given state of things does or shall, or does not or shall not, exist;[1] and this definition, while covering generally the whole field of covenants, is probably as terse and at the same time as perfect a definition of covenants for title as can be framed. No particular form of words is necessary to

[1] 1 Bouv. Law Dict. 402.

constitute a covenant, and any language clearly showing the intent of the parties is sufficient. It is a promise; and the question is what the parties understood by it. Several contracts may be embraced in a single sentence or embodied in a single promise.[1]

Where action is brought on the covenants for a defect or failure of title such covenants are the basis for the action, and the prior agreements which culminated in the deed are ordinarily regarded as merged therein, and for that reason no reference to such prior agreements will usually be permitted for the purpose of enhancing the damages. But it seems that a purchaser under bond for title, who subsequently pays the purchase money and takes a deed, may, in a suit for a breach of the warranty in the deed, put in evidence the bond for title as a part of the history of the transaction, and show that the defendants were bound to make him an indefeasible title.[2]

§ 2. **Seizin.** The first covenant in the order in which they usually appear is that the grantor is well seized of the premises conveyed as of a sure, perfect and indefeasible estate of inheritance in fee-simple, or such other estate as may form the subject of the grant; and, notwithstanding that in a few states this is regarded as a covenant for possession only,[3] the general American doctrine makes it a covenant for title, which is broken as soon as made if the grantor at the time of conveyance has no title.[4]

In an action for a breach of a covenant of seizin, the measure of plaintiff's damages is the consideration paid for the land[5]

[1] Johnson v. Hollensworth, 48 Mich. 140.

[2] Clark v. Whitehead, 47 Ga. 516.

[3] This rule seems to prevail in Massachusetts, Maine and Ohio, but with many qualifications in the latter state.

[4] Pote v. Mitchell, 23 Ark. 590; King v. Gilson, 32 Ill. 348; Stewart v. Drake, 9 N. J. L. 139; Camp v. Douglass, 10 Iowa, 586; Ingram v. Morgan, 4 Humph. (Tenn.) 66; Mitchell v. Hazen, 4 Conn. 497; Dale v. Shively, 8 Kan. 276; Wilson v. Cochran, 46 Pa. St. 229; Salmon v. Vallejo, 41 Cal. 481; Morrison v. Underwood, 20 N. H. 369.

[5] Wilson v. Peele, 78 Ind. 384; Dale v. Shively, 8 Kan. 276. If, pending an action for a breach of a covenant of seizin, the grantee's title becomes perfect by reason of the inurement to his benefit of an after-acquired title by the grantor, the consideration paid for the land is not the measure of damages, but only the amount necessary to indemnify the grantee for acts done by the holder of the adverse title. McInnis v. Lyman, 62 Wis. 191.

and interest thereon from the day of payment,[1] in lieu of mesne profits;[2] the grantee being left to his remedy against the evictor, who has established a paramount title, to obtain pay for improvements.[3] Where the plaintiff makes no proof of consideration, and shows no threatened disturbance of possession, the damages recovered will be nominal.[4] The grantee is not bound to wait until he has been disturbed in his possession, however, but may purchase in the outstanding title and recover from the grantor the reasonable price which he has fairly and necessarily paid for the same.[5] He cannot recover more than the price paid,[6] with interest from the time of payment, nor this unless the proof shows that the title bought was worth the amount paid.[7] Neither is it necessary that the grantee shall have been summarily or forcibly evicted, for he may voluntarily yield possession to the holder of a paramount title without being compelled by legal process, and yet recover upon the covenants of his vendor's deed; but the surrender must be to the holder of the paramount title, not to the vendor.[8]

[1] But if the consideration cannot be ascertained, the value of the land at the time of the intended conveyance, with interest from the date of the deed, will be the measure of damages. Smith v. Strong, 14 Pick. (Mass.) 128.

[2] If the plaintiff has had the use of the premises he can recover no interest for the period prior to his eviction, unless he has been compelled to pay mesne profits to the holder of the paramount title. Hutchins v. Roundtree, 77 Mo. 500; Stebbins v. Wolf, 33 Kan. 765. The general rule, however, is as stated in the text. Marston v. Hobbs, 2 Mass. 433; Sterling v. Peet, 14 Conn. 245; Martin v. Long, 3 Mo. 391; Greene v. Tallman, 20 N. Y. 191; Weiting v. Nissley, 13 Pa. St. 655; Clark v. Parr, 14 Ohio, 121; Burton v. Reeds, 20 Ind. 87; Seamore v. Harlan, 3 Dana (Ky.), 415; Willson v. Willson, 25 N. H. 231. In some states, notably in New York, interest is only computed for six years (see Bennett v. Jenkins, 13 Johns. 50), but generally the rule is stated without limitation.

[3] Conrad v. Druids, 64 Wis. 258.

[4] Norman v. Winch, 65 Iowa, 263; Boone v. McHenry, 55 Iowa, 202; Mecklem v. Blake, 22 Wis. 495.

[5] Prescott v. Trueman, 4 Mass. 627. Provided it does not exceed the original price paid the defendant. Price v. Deal, 90 N. C. 290; Norton v. Babcock, 2 Met. (Mass.) 510.

[6] Snell v. Iowa Homestead Co. 59 Iowa, 701.

[7] Harlow v. Thomas, 15 Pick. (Mass.) 69; Mitchell v. Hazen, 4 Conn. 495. The fact that the grantee paid a certain sum for the outstanding title is not in itself evidence of its value, but may be shown as a fact which, if connected with proof of its fairness, will entitle the grantee to recover the sum so paid. Anderson v. Knox, 20 Ala. 156.

[8] Axtell v. Chase, 83 Ind. 546.

The covenant of seizin, being regarded as merely personal in character, binds only the covenantor or his personal representatives, and inures only to the benefit of the covenantee.[1] Such, at least, is the doctrine held by the great majority of the American cases; but of late years, in a few states, a contrary rule has been announced, and one which apparently finds favor even where it has previously been denied. The reason for the first-mentioned rule is that the covenant of seizin is always held to be *in præsenti*, and broken, if at all, when the deed is delivered; hence, the claim for damages becomes personal in its nature to the grantee, and is not transferred by a conveyance to a subsequent grantee. But in the states before alluded to, where deeds have been reduced to forms of great simplicity, and where *choses in action* may be assigned, the modern English doctrine that the covenant of seizin does run with the land has been adopted. It is contended in support of the same that the contrary rule will operate oppressively in all cases where the land has been subsequently conveyed by the grantee, either toward the grantor or subsequent purchaser. If the purchaser is evicted, it is said, he ought to receive the indemnity secured by the covenant, for he is not only the first sufferer but the only sufferer in every instance, except when he has not paid for the land. When the grantee, under the deed containing the covenant, has sold and received pay for the land, it would be gross injustice to permit him to recover, for he would not in that case sustain damages. Under the first rule the grantee may recover under the covenant of seizin, and if there be a covenant of warranty in the deed the subsequent grantee may also recover upon that contract against the first grantor. But if there be no covenant of warranty there exists the equally strange case of a party — the first grantee — recovering damages when he is entitled to none, and the party really injured unable to recover.[2] For this reason the cove-

[1] Ross v. Turner, 7 Ark. 132; Redwine v. Brown, 10 Ga. 311; Moore v. Merrill, 17 N. H. 75; Garfield v. Williams, 2 Vt. 327; Mitchell v. Warner, 5 Conn. 497; Brady v. Spruck, 27 Ill. 478; Bartholomew v. Condee, 14 Pick. (Mass.) 167. In a few of the states the rule is otherwise. See Coleman v. Lyman, 42 Ind. 289; Schofield v. Homestead Co. 32 Iowa, 317; Backus v. McCoy, 3 Ohio, 211. In these states the English rule is followed and the covenants run with the land.

[2] Schofield v. Homestead Co. 32 Iowa, 317.

nant of seizin is permitted to operate as a covenant running with the land, and in view of our present system of land transfers it is difficult to see wherein it is not just.[1]

§ 3. **Continued — Total breach.** As previously remarked, the measure of damages for a total breach of the covenant of seizin — that is, where the grantee takes nothing by his conveyance — is the amount of the consideration paid with interest, or, as it is sometimes put, the value of the land at the time of sale as agreed upon by the parties and evidenced by the consideration paid.[2] This is now the generally accepted rule where the grantee has been compelled by the assertion of a paramount title to yield possession to the claimant, or has suffered some other substantial injury. It would seem, however, that the measure of damages is still a vexed question where the covenantee has entered and held possession of the land under the deed without ouster or eviction by paramount title, and without having sustained any real injury in consequence of an alleged breach. Indeed, there seems to be an irreconcilable conflict of decisions upon the subject. In many states no distinction is taken between a nominal and a substantial breach; and where there is a total failure of title the grantee is permitted to recover full damages, although he has not been ousted by the holder of the paramount title, and, though still in possession of the land, may sue for and recover back the purchase money paid,[3] and interest upon the same for such length of time as he himself may be liable for the use and occupation of the premises to the rightful owner.[4] In other of

[1] See Mecklem v. Blake, 22 Wis. 495; Overhiser v. McAllister, 10 Ind. 41; Foote v. Burnet, 10 Ohio, 317; Dickson v. Desire, 23 Mo. 151.

[2] Wilson v. Peele, 78 Ind. 384; Dale v. Shively, 8 Kan. 276; Mitchell v. Hazen, 4 Conn. 495; King v. Gilson, 32 Ill. 348; Stubbs v. Page, 2 Me. 378; Cressfield v. Storr, 36 Md. 150; Willson v. Willson, 25 N. H. 229; Price v. Deal, 90 N. C. 290; Blake v. Burnham, 29 Vt. 437; Sumner v. Williams, 8 Mass. 162; Lawless v. Collier, 19 Mo. 480; Clark v. Parr, 14 Ohio, 118; Kimball v. Bryant, 25 Minn. 496; Phipps v. Tarpley, 31 Miss. 433.

[3] Smith v. Jefts, 44 N. H. 482; Chapman v. Jones, 10 N. J. L. 24; Lawrence v. Montgomery, 37 Cal. 183; Bickford v. Page, 2 Mass. 455; Craig v. Donovan, 63 Ind. 513.

[4] See Parker v. Brown, 15 N. H. 176; Lawless v. Collier, 19 Mo. 480; Flint v. Steadman, 36 Vt. 210. This doctrine has been carried so far as to hold that full damages may be recovered on a covenant for seizin, even where the land has been conveyed by the covenantee before ac-

the states a broad distinction is made between a mere formal breach, from which no real damage results, and a final or complete breach, by which the possession of the land is lost, or other actual injury ensues. In the former event it is maintained that no recovery can be had except for nominal damages, on the ground that it would be manifestly unjust and inequitable to permit the vendee to recover the consideration and still retain possession of the land, which might, by lapse of time, ripen into a perfect title.[1]

In the first-mentioned line of decisions it is held that the covenant is broken as soon as made, and becomes at once a *chose in action*, personal to the covenantee, and not assignable at common law, or passing by descent or conveyance of the land. In the latter, the courts hold that where the covenantor is in possession, claiming title, and delivers the possession to the covenantee, the covenant of seizin is not a mere present engagement, made for the sole benefit of the covenantee, but that it is a covenant of indemnity entered into in respect of the land conveyed, and intended for the security of all subsequent grantees, until the covenant is finally and completely broken.[2]

Notwithstanding that the vendor's title may be imperfect at the time of the execution of his deed, yet, if he afterwards acquire a perfect title which may inure to the grantee, this will make good the covenant, and the vendee, if not otherwise damaged, can recover only nominal damages for the technical breach existing at the time of conveyance.[3] So, also, if the possession of the vendor has by lapse of time ripened into a valid title under the statute of limitations, his recovery would be restricted to nominal damages only.[4]

tion brought without warranting the title, and for as much or even more than he originally gave. Davis v. Lyman, 6 Conn. 249; Cornell v. Jackson, 3 Cush. (Mass.) 509; Bennett v. Irwin, 3 Johns. (N. Y.) 363.

[1] See Norman v. Winch, 65 Iowa, 263; Farmers' Bank v. Glenn, 68 N. C. 35; Noonan v. Ilsley, 22 Wis. 27; Haynes v. White, 55 Cal. 38.

[2] Overhiser v. McAllister, 10 Ind. 41; Foote v. Barnet, 10 Ohio, 317; Dickson v. Desire, 23 Mo. 151; Morrison v. Underwood, 20 N. H. 869 Mecklem v. Blake, 22 Wis. 495.

[3] Baxter v. Bradbury, 20 Me. 260; Hartford, etc. Co. v. Miller, 41 Conn. 112; Morrison v. Underwood, 20 N. H. 369; King v. Gilson, 32 Ill. 348; Burke v. Beveridge, 15 Minn. 208; Knowles v. Kennedy, 82 Pa. St. 445.

[4] Pate v. Mitchell, 23 Ark. 591; Garfield v. Williams, 3 Vt. 328.

§ 4. **Continued — Partial breach.** The general rule that actual damages only can be recovered for a breach of contract applies with full force in respect to covenants, and the doctrine is well established that where the breach of a covenant is only partial the covenantee recovers *pro tanto* only. This has long been the recognized rule and is of general observance.[1] And it seems, also, that where the title to a part only of the land fails, the sale cannot be rescinded and the whole consideration recovered back, but the vendee is restricted to his recovery of the proportionate loss.[2]

§ 5. **Right to convey.** This covenant, like the preceding, is merely personal and does not run with the land, and is broken, if at all, immediately upon the execution of the deed.[3]

§ 6. **Incumbrances.** The covenant against incumbrances embraces every right to, and interest in, the lands conveyed, diminishing the value of the estate, but not inconsistent with a transfer of the fee. It is not a mere covenant to indemnify, though often described as such, but an engagement that the grantor's title is not incumbered, and is broken, if at all, at the instant of its creation.[4] The exact character to be given to it is unfortunately a matter of dispute in this country, and will probably long so continue, as diametrically opposed rulings have been laid down in regard to it in many of the states. The great preponderance of authority holds that the covenant does not run with the land;[5] that being broken as soon as made by the existence of an incumbrance, it is thereby turned into a mere right of action which is not assignable at law, and which can be taken advantage of only by the covenantee or his personal representatives, and can neither pass to an

[1] Lockwood v. Sturdevant, 6 Conn. 373; Blanchard v. Blanchard, 48 Me. 174; Phillips v. Reichert, 17 Ind. 120; McNear v. McComber, 18 Iowa, 14; Lucas v. Wilcox, 135 Mass. 77; Furniss v. Fergusen, 15 N. Y. 443.

[2] Morris v. Phelps, 5 Johns. 48; Phillips v. Reichert, 17 Ind. 122; Smith v. Hughes, 50 Wis. 625.

[3] Bickford v. Page, 2 Mass. 455; Richardson v. Dorr, 5 Vt. 20; Scantlin v. Allison, 12 Kan. 85.

[4] Chapman v. Kimball, 7 Neb. 399; Eaton v. Lyman, 30 Wis. 41; Andrews v. Davison, 17 N. H. 413.

[5] Brooks v. Moody, 25 Ark. 452; Davis v. Lyman, 6 Conn. 249; Wyman v. Ballard, 12 Mass. 304; Potter v. Tyler, 6 Vt. 676; Pillsbury v. Mitchell, 5 Wis. 17; Lawrence v. Montgomery, 37 Cal. 183; Moore v. Merrill, 17 N. H. 75; Fuller v. Jillette, 9 Biss. (C. Ct.) 296; Kellogg v. Malin, 62 Mo. 429; Galison v. Sandford, 12 N. J. L. 261; Mills v. Saunders, 4 Neb. 190.

heir, a devisee nor a subsequent purchaser.[1] In this respect it is governed by substantially the same rules that obtain in the construction of the covenants of seizin and right to convey, or of other covenants *in præsenti*, which are broken, if at all, when the deed is delivered.

The English rule, however, permits an action by a remote grantee on the covenant of seizin; and this rule, which has been adopted in a few of the American states, has been further enlarged in some localities to include other covenants *in præsenti* as well. It is contended in support of the same that the principle which allows an action in the name of the assignee of the covenant of seizin applies with much greater force in the case of the assignment of the covenant against incumbrances when drawn in the form usual in this country. Where the covenant of seizin is broken, and there is an entire failure of title, the breach is final and complete, and the covenant being broken, once for all, actual damage and all damages that can result from the breach have accrued and are at once recoverable. In such case the right of action is substantial, and its transfer might well be held to come within the rule prohibiting the assignment of *choses in action*. But the covenant against incumbrances, being in its practical application one of indemnity, the covenantee can recover only nominal damages for a breach thereof, unless he can show that he has sustained actual loss or injury thereby, or has had to pay money to remove the incumbrance. Without this there is the barren right of recovery of only nominal damages; the right of action is one only in name. A subsequent grantee, it is said, does not claim to sue by means of the purchase of a *chose in action*. The subject of his purchase was a lot of ground; his claim is that the covenant was annexed to the real estate; that it ran with the land and passed to him, not by direct operation of assignment, but as an incident to the land. The right of suit

[1] Salmon v. Vallejo, 41 Cal. 481; Dale v. Shively, 8 Kan. 276; Prescott v. Trueman, 4 Mass. 627; Stewart v. Drake, 9 N. J. L. 139; Andrews v. Davison, 17 N. H. 413; Eaton v. Lyman, 30 Wis. 41; Brooks v. Moody, 25 Ark. 452; Mills v. Saunders, 4 Neb. 190. A distinction has been made in some cases which provides that where the incumbrance exists at the time of the first conveyance and so continues after the assignment, so as to enlarge continually the ground for damages, the covenant passes to the assignee. See Sprague v. Baker, 17 Mass. 586.

for nominal damages which the covenantee had against the covenantor was no matter of consideration between the parties at the time of the purchase, but they expected that, in case the grantee should sustain any actual damage by reason of a prior incumbrance, the covenant would then be to him a means of indemnity. In the view here taken it has been held that the case does not come within the reason of the rule prohibiting the assignment of *choses in action*, and that a remote grantee of lands may maintain an action in his own name against the original grantor on a covenant in the deed of the latter "that the said lands are free from all incumbrances," where the substantial breach of the covenant occurs after the assignment, and the whole actual damages are sustained by the assignee;[1] while other decisions have made still broader rules for the benefit of the remote grantee.[2] In some states, and particularly those possessing a code, all legal *choses in action* are assignable, and it has been held under such laws that the covenant against incumbrances necessarily passes to the person to whom the land is conveyed together with the land.[3]

The term "incumbrance" includes all restrictions, obstructions and impediments tending to prevent or impair the free use or transfer of the land.[4] Hence, a highway, or a railroad located and running over land, is an incumbrance, and to a greater or less degree obstructs and incumbers the free use and enjoyment of the property; and a person selling land thus incumbered, and covenanting that it is not, may be held to perform his covenant by its removal, or respond in damages.[5] This doctrine, which is sustained by the volume of authority, looks a little harsh at first, although it is manifestly in harmony with the general doctrine of easements, and on several occasions has been denied. In one instance it was held that,

[1] Richard v. Bent, 59 Ill. 38. See Sprague v. Baker, 17 Mass. 586.

[2] See Knodler v. Sharp, 36 Iowa, 232; Cole v. Kimball, 52 Vt. 639.

[3] Boyd v. Belmont, 58 How. Pr. (N. Y.) 513.

[4] Clark v. Swift, 3 Met. (Mass.) 390; Cathcart v. Bowman, 5 Pa. St. 317; Runnells v. Webber, 59 Me. 488.

[5] Purcell v. R. R. Co. 50 Mo. 504; Burk v. Hill, 48 Ind. 52; Beach v. Miller, 51 Ill. 206; Mitchell v. Warner, 5 Conn. 508; Barlow v. McKinley, 24 Iowa, 70. The rule extends to all easements or servitudes, and includes private as well as public ways. See Russ v. Steele, 40 Vt. 310; Wilson v. Cochran, 46 Pa. St. 233; Weatherbee v. Bennett, 2 Allen (Mass.), 428.

where there are railways or other highways in use as such over land at the time of its sale, the purchaser is presumed to have taken with knowledge of them, and they constitute no breach of the usual covenants in his deed;[1] and in another that a highway does not constitute an incumbrance in the ordinary meaning of the term.[2] Ordinarily, however, knowledge of the incumbrance by the covenantee affords no grounds for relief.[3]

Unpaid taxes, constituting a lien on the land, are within the covenant against incumbrances,[4] and special assessments are classed the same as taxes.[5] The liability to assessments for the opening of a street has been held to be a breach of the covenant in a deed executed after the street was opened, though before any assessments were made,[6] although this seems to be a rather extreme case. An attachment resting on land is within the covenant;[7] and the same is true of other legal process of like character. An outstanding lease is within the meaning of a covenant against incumbrances,[8] yet where the breach consists simply of the existence of an unexpired term, the measure of damages is the value of the use of the premises for the time the grantee has been deprived of them.[9] In like manner, an outstanding dower interest is a breach of the covenant,[10] even though it become consummate only after the execution of the deed;[11] and the grantee may, after demand of dower, extinguish the same and recover a reasonable price paid therefor as damages for the breach.[12] An easement consisting of a

[1] Smith v. Hughes, 50 Wis. 620; Desvergers v. Willis, 56 Ga. 515.

[2] Jordan v. Eve, 31 Gratt. (Va.) 1.

[3] Williamson v. Hall, 62 Mo. 405; Beach v. Miller, 51 Ill. 206.

[4] Fuller v. Jillette, 9 Biss. (C. Ct.) 296; Plowman v. Williams, 6 Lea (Tenn.), 268; Cochran v. Guild, 106 Mass. 29.

[5] The grantee would be entitled to recover the reasonable expenses paid by him to remove the same, although the assessment was in fact invalid, provided it might be re-assessed. Coburn v. Litchfield, 132 Mass. 449. So if the assessment which was afterwards vacated had been re-assessed and the grantee compelled to pay the same. Cadmus v. Fagan, 47 N. J. L. 541.

[6] Fagan v. Cadmus, 46 N. J. L. 441.

[7] Kelsey v. Remer, 43 Conn. 139.

[8] Although it seems that an illegal refusal by a lessee to surrender possession is not. Noyes v. Rockwood, 56 Vt. 647.

[9] Fritz v. Pusey, 31 Minn. 368.

[10] Runnels v. Webber, 59 Me. 488; Biglow v. Hubbard, 97 Mass. 195.

[11] And by a change of the law as to the mode of assignment. Walker v. Deaver, 79 Mo. 664.

[12] Ward v. Ashbrook, 78 Mo. 515.

right to flow land, being a restriction upon the use, has been held to constitute a breach of the covenant.[1] Indeed this is the only covenant broken by the existence of an easement; and hence if a purchaser desires to protect himself against easements he must take a covenant against incumbrances.[2]

The measure of damages for a breach of a covenant against incumbrances will ordinarily be the cost of extinguishing the incumbrances or the amount necessarily expended in removing the same,[3] and though the grantee has neither removed nor extinguished the same he may still recover nominal damages.[4] The recovery can never exceed, however, the amount paid to relieve the property from the incumbrance,[5] nor, according to some of the authorities, the actually received consideration of the deed;[6] but this latter rule does not find universal assent, and the doctrine is positively stated by other cases that the cost of extinguishing the incumbrance forms the true basis of the recovery, without regard to the purchase price or the value of the land.[7] If the covenantee is evicted, and there is thereby a total failure of consideration, he will recover the value of the land at the time of the eviction, provided he has paid the purchase money, or, if the purchase money has been but partially paid, may recover the amount paid with interest, not

[1] Patterson v. Sweet, 3 Ill. App. 550.

[2] But if he has neglected so to do, and the existence of the easement is concealed from him, he may sue for the deceit. McMullin v. Wooley, 2 Lans. (N. Y.) 394. And in some cases an existing easement has been held to be a breach of the covenant of warranty. See Flynn v. Mining Co. 72 Iowa, 738.

[3] St. Louis v. Bissell, 46 Mo. 157; Eaton v. Lyman, 30 Wis. 41; Morehouse v. Heath, 99 Ind. 509; Prescott v. Trueman, 4 Mass. 627; Comings v. Little, 24 Pick. (Mass.) 266; Fawcett v. Woods, 5 Iowa, 400; Lewis v. Harris, 31 Ala. 689; Kelley v. Low, 18 Me. 244; Loomis v. Bedel, 11 N. H. 74. Whether the amount paid was reasonable is a question for the jury. On such question the record of a recovery against the covenantee, of which the covenantor had notice, is not conclusive; nor is the fact of payment any evidence of what the incumbrance was worth. Walker v. Dever, 5 Mo. App. 139.

[4] Eaton v. Lyman, 30 Wis. 41; Beecher v. Baldwin, 55 Conn. 419; Wyman v. Ballard, 12 Mass. 304.

[5] Meyers v. Brodbeck, 110 Pa. St. 198.

[6] Andrews v. Appel, 22 Hun (N. Y.), 429. And see Norton v. Babcock, 2 Met. (Mass.) 510; Foote v. Burnet, 10 Ohio, 317.

[7] Walker v. Deaver, 79 Mo. 664; Knadler v. Sharp, 36 Iowa, 232; Guthrie v. Russell, 46 Iowa, 269.

exceeding, however, the value of the land.[1] If the incumbrance is of a permanent nature, and such as the covenantee cannot remove, he should recover a just compensation for the actual injury resulting from its continuance.[2] If it is of such a character as he may remove, but does not, unless it interferes with his enjoyment of the property he should recover only nominal damages.[3] The reason for this latter rule is said to be that if the covenantee has not extinguished the incumbrance it is still outstanding and may still be asserted against the mortgagor on his personal obligation; that, being still outstanding, the purchaser has suffered no actual damage, and that he should not be permitted to recover the value of the incumbrance on a contingency, when he may never be disturbed by it; and further, that if the purchaser feels the inconvenience of an existing incumbrance, and the hazard until he is evicted, he may go and satisfy the same and then resort to his covenant for satisfaction. Hence it is that from an early day no more than merely nominal damages have been permitted to be recovered where the breach is only technical.[4] There can be no doubt, however, but that the continued existence of an incumbrance is a positive damage to the purchaser's title, and that actual injury may result to him by reason thereof, even though he is not called upon to pay it. The office of the covenant is to indemnify him against any injury he may sustain by reason of the covenant, and it has been held that even a consequential damage directly attributable to the covenantor's violation of his covenant will afford grounds for the maintenance of an action.[5]

[1] Beecher v. Baldwin, 55 Conn. 419; Norton v. Babcock, 2 Met. (Mass.) 510.

[2] Harlow v. Thomas, 15 Pick. (Mass.) 66; Porter v. Bradley, 7 R. I. 538; Willson v. Willson, 25 N. H. 229; Hubbard v. Norton, 10 Conn. 422; Kellogg v. Manlin, 50 Mo. 496; Beach v. Miller, 51 Ill. 206; Barlow v. McKinley, 24 Iowa, 69.

[3] Wyman v. Ballard, 12 Mass. 304; Prescott v. Trueman, 4 Mass. 630; Richardson v. Dorr, 5 Vt. 9; Collier v. Gamble, 10 Mo. 467; Stowell v. Bennett, 34 Me. 422; Willets v. Burgess, 34 Ill. 494; Greene v. Tallman, 20 N. Y. 191.

[4] Wyman v. Ballard, 12 Mass. 304; Tufts v. Adams, 8 Pick. (Mass.) 547; Delavergne v. Norris, 7 Johns. (N. Y.) 358; Richardson v. Dorr, 5 Vt. 9; Eaton v. Lyman, 30 Wis. 41; Mills v. Saunders, 4 Neb. 190; Osgood v. Osgood, 39 N. H. 209; Eddington v. Nix, 49 Mo. 134; Randell v. Mallett, 14 Me. 51; Foote v. Burnet, 10 Ohio, 317; Funk v. Creswell, 5 Iowa, 62; Brady v. Spruck, 27 Ill. 478.

[5] See Funk v. Voneida, 11 S. & R. (Pa.) 109. In this case the covenant

The fact that the covenantee knew of the existence of the incumbrance at the time of the execution of the deed is usually immaterial, and is not admissible in mitigation of damages.[1]

§ 7. **Continued — Existing easements.** As stated in the preceding paragraph, a covenant against incumbrances is generally held to be broken by the existence of an easement over any portion of the land and with reference to which the covenant is made. This rule does not find universal assent, but it is so general that it may be safely stated as a proposition of law of controlling efficacy, except where it has been specifically denied. It has been held in some cases that incumbrances are of two kinds — first, such as affect the title; and second, such as affect only the physical condition of the property; that where incumbrances of the former class exist the covenant is broken the instant it is made, and it is of no importance that the grantee had notice of them when he took the title; that where, however, there is a servitude imposed upon the land which is visible to the eye, and which affects not the title but the physical condition of the property, it is presumed that the grantee took the property in contemplation of such condition and with reference thereto.[2] But these views have been explicitly rejected in many states as having no adequate foundation in principle or reason. It is contended that they open to litigation upon parol evidence, in every action for the breach of the covenant against incumbrances caused by the existence of an easement, the question whether the grantee knew of its existence; and in every such case the protection of written covenants can be absolutely taken away by disputed oral evidence.

Arguing upon these premises the safe rule is held to be that the covenants in a deed protect the grantee against every adverse right, interest or dominion over the land, and that he

was broken by the existence of a paramount mortgage which induced the creditors of the purchaser to enforce their claims against him in such manner as to entail great loss; the court held that he had sustained all the damage possible by reason of the mortgage and awarded him its value.

[1] Townsend v. Wild, 8 Mass. 146; Harlow v. Thomas, 15 Pick. (Mass.) 66.

[2] Memmert v. McKeen, 112 Pa. St. 315; Jordan v. Eve, 31 Gratt. (Va.) 1. And see Kutz v. McCune, 22 Wis. 628; Smith v. Hughes, 50 Wis. 620; Desvergers v. Willis, 56 Ga. 515.

may rely upon them for his security. If open, visible and notorious easements are to be excepted from the operation of covenants, it should be the duty of the grantor to except them, and the burden should not be cast upon the grantee to show that he was not aware of them. The security of titles demands that a grant made without fraud or mutual mistake shall bind the grantor according to its written terms. It should not be incumbent upon the grantee to take special and particular covenants against visible and apparent defects in the title or incumbrances upon the land.

Under the foregoing principles, roads and ways, being to a greater or less extent obstructions to the free use and enjoyment of the property, have been held to constitute incumbrances, and that their existence will constitute a breach of the covenant for which damages will lie.[1] But in some states highways have been made the one exception to the rule that the existence of an easement constitutes a breach of the covenant against incumbrances.[2]

[1] See Burk v. Hill, 48 Ind. 52; Beach v. Miller, 51 Ill. 206; Russ v. Steele, 40 Vt. 310; Barlow v. McKinley, 24 Iowa, 69; Pritchard v. Atkinson, 3 N. H. 335; Wilson v. Cochran, 48 Pa. St. 107; Clark v. Swift, 3 Met. (Mass.) 390; Haynes v. Young, 36 Me. 557; Hubbard v. Norton, 10 Conn. 431.

[2] It was held in Whitbeck v. Cook, 15 Johns. (N. Y.) 483, that it is not a breach of the covenants that the grantor was lawful owner of the land, was well seized, and had full power to convey, that part of the land was a public highway, and was used as such; and that decision has ever since been regarded as the law in New York. This decision was based upon the peculiar nature of highway easements, and the general understanding with reference to them. Spencer, J., writing the opinion, said: "It must strike the mind with surprise that a person who purchases a farm through which a public road runs at the time of purchase, and had so run long before, who must be presumed to have known of the existence of the road, and who chooses to have it included in his purchase, shall turn around on his grantor and complain that the general covenants in the deed have been broken by the existence of what he saw when he purchased, and what must have enhanced the value of the farm. It is hazarding little to say that such an attempt is unjust and inequitable, and contrary to the universal understanding of both vendors and purchasers. If it could succeed, a flood-gate of litigation would be opened, and for many years to come this kind of action would abound. These are serious considerations, and this court ought, if it can consistently with law, to check the attempt in the bud." These reasons are not applicable to other easements, and the rule of that case has not been applied to any other. See, also, Bailey v. Miltenberger, 31 Pa. St. 41

The existence of an easement consisting of a railroad right of way over the land has frequently been held to be a breach of the covenant against incumbrances [1] for which the grantee may recover, even though he knew of it at the time he purchased.[2] But in respect to easements obviously and notoriously affecting the physical condition of the premises at the time of sale, considerable diversity of opinion exists.[3] A right of way for the purposes of a private road or passage-way is an injury for which compensation may be granted;[4] and it seems that this will be the rule even though the purchaser has never suffered any disturbance in the enjoyment of the property by reason thereof. The existence of such right, notwithstanding it may not be exercised, is yet a detriment to the property, affecting both its market value and the method of its enjoyment.[5]

The description of the property, although not in terms purporting to specify all of the servitudes to which it is subject, may yet be sufficient to relieve the grantor from the consequences of a breach of the covenant against incumbrances where enough is stated to justify reasonable implication.[6]

§ 8. **Continued — Unpaid taxes.** If at the time a covenant against incumbrances is made the property to which it relates is subject to the lien of a tax or assessment, the covenantee is clearly liable. That the property may have been the subject of taxation, or if initial steps had been had tending to ultimate taxation, does not, however, control the question; for, it would seem, until the amount of the tax is ascertained and determined no lien or incumbrance exists by reason thereof. The proper construction of this covenant, it is held, merely calls

[1] Quick v. Taylor, 113 Ind. 540; Barlow v. McKinley, 24 Iowa, 69.

[2] Flynn v. Mining Co. 72 Iowa, 738; Barlow v. McKinley, 24 Iowa, 69.

[3] Thus, in Kutz v. McCune, 22 Wis. 628, it was held that a right of flowage over part of the premises would not be included in a general covenant against incumbrances.

[4] Harlow v. Thomas, 15 Pick. (Mass.) 66.

[5] Wetherbee v. Bennett, 2 Allen (Mass.), 428.

[6] So where land which is conveyed by deed is described as land "through which the water from a mill passes," and the grantor inserts a covenant in the deed that the granted premises are free from all incumbrances, the existence of a right in the mill-owner to cleanse the natural channel of the stream and remove obstructions to the free flow of the water from the mill is not an incumbrance within the meaning of such covenant. Prescott v. Williams, 5 Met. (Mass.) 429.

for the freedom of the property, at the time of conveyance, from what can be considered an incumbrance upon the same; not freedom from some undetermined matter which may ripen into a charge imposed as a lien by law, but freedom from a visible and ascertained incumbrance.

Under that system of taxation which provides for the imposition of taxes by the municipal legislative bodies upon assessment rolls prepared for them and statements and estimates of the needs and purposes of the municipality, it has been held that all steps leading to the exercise of the taxing power by the municipal body are initial only in the proceedings which result in taxation, and in no sense impose a charge or create an incumbrance upon the land described in the assessment roll; that no assessment or tax exists as an incumbrance or as a charge upon lands in the roll, within the meaning of a covenant in a deed against charges, taxes, assessments and incumbrances, until it has been confirmed and the amount thereof has been determined in the methods prescribed by law.[1]

A distinction seems to exist between an assessment for a completed improvement[2] and an assessment for proposed improvements or an annual tax.

§ 9. **Dower rights.** Outstanding rights of dower, whether inchoate or consummate, are now generally regarded as incumbrances within the operation of the covenant;[3] yet if the right is only inchoate, inasmuch as it is uncertain that any loss

[1] Lathers v. Keogh, 109 N. Y. 583. And see Dowdney v. Mayor, etc. 54 N. Y. 186; Barlow v. Bank, 63 N. Y. 399.

[2] In De Peyster v. Murphy, 66 N. Y. 622, the court held that, under a covenant against incumbrances, an assessment for a completed improvement was a charge against the person and the property, and was fairly embraced within the meaning of the covenant, without regard to the question whether it was a lien under the statute. The learned judge said: "At the time when the contract had was entered into the improvement had been made; the plaintiff was in the full enjoyment of the benefits arising from the same, and it evidently constituted a portion of the value of the premises and entered into the consideration upon the sale of the same." And he further held that although an assessment which had been made and confirmed was not a lien for the purposes of the statute, it was nevertheless a charge "against the party which incumbered the premises and against which he was bound to provide."

[3] Bigelow v. Hubbard, 97 Mass. 195; Donnell v. Thompson, 10 Me. 170; Russell v. Perry, 49 N. H. 547; McAlpin v. Woodruff, 11 Ohio St. 120; Henderson v. Henderson, 13 Mo. 151.

will ever occur, nominal damages only can be recovered; and it seems that, even if such right be consummate, if there has been no admeasurement or assignment, the rule would be the same, as the question would still rest upon a contingency and the possibility that the widow would never procure her dower to be assigned.[1] So, too, as the covenant of general warranty is only broken by an eviction, or something which the law regards as equivalent thereto, it has been held that the covenant is not broken by the mere existence of an outstanding dower right which is not asserted.[2]

§ **10. Quiet enjoyment.** The covenant for quiet enjoyment is prospective in its operation and runs with the land.[3] It goes only to the possession, however, and not to the title, and is broken only by an eviction from, or some actual disturbance in, the possession.[4] In this respect it differs from the covenant of seizin, although, as a general rule, the measure of damages for a breach thereof is the same.

To constitute a breach of the covenant of quiet enjoyment there must be an eviction, actual or constructive, from the possession of the whole or a part of the premises;[5] that is, an actual dispossession under a lawful claim of paramount title,[6] or a deprivation of the possession of part of the land, or, what is equivalent, a title which is capable of being used to deprive the grantee of his possession of a portion of the land covered by his deed.[7] The mere existence of an incumbrance, therefore, does not constitute a breach;[8] and the covenantee, who has obtained possession, will never be permitted to recover as for breach of the covenant for a mere failure or defect of title, so long as he is left in possession, as he may never be disturbed and thus never suffer damage.[9] It is not necessary, however,

[1] Hazelrig v. Huston, 18 Ind. 481; Runnells v. Webber, 59 Me. 488.

[2] Bostwick v. Williams, 36 Ill. 65.

[3] Heath v. Whidden, 24 Me. 383; Beddoe v. Wadsworth, 21 Wend. (N. Y.) 120; Shelton v. Codman, 3 Cush. (Mass.) 318; Bostwick v. Williams, 36 Ill. 65.

[4] Hayes v. Ferguson, 15 Lea (Tenn.), 1; McGary v. Hastings, 39 Cal. 360; Boothby v. Hathaway, 20 Me. 251.

[5] Parkinson v. Sherman, 74 N. Y. 93; Clark v. Lineberger, 44 Ind. 223; Ware v. Lithgow, 71 Me. 62; Owen v. Thomas, 33 Ill. 320.

[6] Kent v. Welch, 7 Johns. (N. Y.) 258; Moore v. Frankenfield, 25 Minn. 540; Wade v. Comstock, 11 Ohio St. 71.

[7] McMullin v. Wooley, 2 Lans. (N. Y.) 395.

[8] Clark v. Lineberger, 44 Ind. 223; Moore v. Frankenfield, 25 Minn. 540.

[9] Scriver v. Smith, 100 N. Y. 471.

that the paramount title should be established by judgment before the covenantee will be authorized to surrender possession, nor need there be an actual dispossession; if the paramount title is so asserted that he must yield or leave, the covenantee may purchase or lease of the true owner, and this will be considered a sufficient eviction to constitute a breach.[1] The covenantor will further be held liable, not only in all cases coming technically within the letter of the rule, but also in all cases falling within its reason.[2] It has therefore been held that where, at the time of the execution of a deed, the premises are in the possession of a third person holding under a paramount title, and the grantee in consequence is kept out of possession, this is a breach of covenant of quiet enjoyment; and notwithstanding the fact that there never has been an actual ouster, the grantee may nevertheless maintain an action on the covenant. The fact that the covenantee is kept out by means of a superior title is equivalent to an eviction, and gives effect to the covenant.[3] An easement is more in the nature of an incumbrance, and has been held to fall within the operation of that covenant. Both title and possession remain with the grantee, even though the easement may be a grievous burden greatly restricting the use of the property. It has been held, however, in a late case,[4] that where there is an outstanding title to an easement in the premises conveyed, which materially impairs the value of the premises and interferes with the use and possession of some portion thereof, the covenant is broken although there is not a technical physical ouster from the actual possession of any portion thereof.

As a general rule the measure of damages for a breach of the covenant of quiet enjoyment is the price paid for the land with interest,[5] and if nothing has been paid as the price of the land the damages are nominal.[6]

§ **11. General warranty.** The covenant of general warranty is the most comprehensive as well as important of all

[1] McGary v. Hastings, 39 Cal. 360.

[2] Scriver v. Smith, 100 N. Y. 471.

[3] Shattuck v. Lamb, 65 N. Y. 499.

[4] Scriver v. Smith, 100 N. Y. 471. And see Adams v. Conover, 87 N. Y. 422; Clark v. Conroe, 38 Vt. 469; Lamb v. Danforth, 59 Me. 322.

[5] Price v. Deal, 90 N. C. 290; West v. West, 76 N. C. 45; McGary v. Hastings, 39 Cal. 360.

[6] West v. West, 76 N. C. 45.

the ordinary covenants contained in the deed. It is a covenant for title and runs with the land;[1] and where a covenantee or his grantee conveys the land before a breach of the covenant has occurred, the last grantee becomes the assignee of the covenant and he alone can sue for a subsequent breach.[2] It is prospective in character, and is understood to be broken only upon an eviction, or something equivalent thereto,[3] or a disturbance of the peace of the grantee.[4]

To authorize a suit by the covenantee against the covenantor for a breach of a general warranty of title, there must have been some hostile assertion of the paramount title to which possession was yielded or which was bought in. It is not necessary that suit shall have been instituted, but it is essential that the true owner shall have given notice, in some way, of his intention to assert his claim. The covenantee cannot, merely because he has ascertained that some other person holds a title superior to his own, abandon that possession which he received from the covenantor and demand a return of the purchase money or the value of the land. It is not sufficient that he shall be satisfied that the outstanding title is the true one, and if asserted cannot be resisted, because, in point of fact, it may never be asserted, or, if asserted in the future, the flow of time may have so ripened his possession that he can successfully combat it. Good faith, therefore, to his vendor requires that he shall stand his ground until, in some way, he is called upon to surrender.[5] Special circumstances may take

[1] Blackwell v. Atkinson, 14 Cal. 470; Brown v. Metz, 33 Ill. 339; Wilson v. Taylor, 8 Ohio St. 595; Brown v. Staples, 28 Me. 497; Mitchell v. Warner, 5 Conn. 497.

[2] Park v. Bates, 12 Vt. 381; Stewart v. West, 14 Pa. St. 336; Giddings v. Canfield, 4 Conn. 482; Post v. Campau, 42 Mich. 90; Stewart v. Drake, 9 N. J. L. 139; McGary v. Hastings, 39 Cal. 360; Claycomb v. Munger, 51 Ill. 373. But if the last conveyance contain a covenant of warranty, and the grantor therein afterwards purchase in an outstanding superior title that will satisfy his covenant to his grantee, he will have his action against the first covenantor, there being no other who could maintain it. *Ibid.*

[3] Stewart v. Drake, 9 N. J. L. 139; Park v. Bates, 12 Vt. 381; Claycomb v. Munger, 51 Ill. 373; Bailey v. Moore, 21 Ill. 165; McGary v. Hastings, 39 Cal. 360; Post v. Campau, 42 Mich. 90.

[4] Scott v. Kirkendall, 88 Ill. 495.

[5] Green v. Irving, 54 Miss. 450; Mason v. Cooksey, 51 Ind. 519; Kellogg v. Platt, 33 N. J. L. 328. As where wild lands were purchased which were subject to the title of the

a case out of the operation of this principle, and enable those who hold under a defective title to abandon possession as upon eviction and still sue their covenantors as for a breach; but ordinarily the rule holds good, and unless there has been either an actual eviction by judicial process or a surrender of possession to a valid, subsisting, paramount legal title asserted against the covenantee, or a holding of the grantee out of possession by such title, so that he cannot enter, the action cannot be sustained for more than nominal damages.[1]

The true meaning of the covenant of general warranty is, however, that the grantee, his heirs and assigns, shall not be deprived of possession by force of a superior title, and in effect, therefore, it is the same as that of quiet enjoyment, extending both to the possession and the title. Hence, any disturbance of the free and uninterrupted use of land, though without actual expulsion therefrom, is in law an eviction and a breach of the covenant.[2]

A covenant of warranty is broken by a failure on the part of the vendor, caused by a defect of title, to put the grantee in possession;[3] yet where, at the date of the deed, the premises granted are in the possession of other persons claiming adversely to the grantee and his grantor, and such persons, and others claiming under them, are permitted by the grantee and those deriving title from or through him to remain undisturbed until their adverse possession ripens into a good title as against the grantee, it has been held that the latter, or those claiming under him, cannot be allowed to recover upon the covenants

state, *held*, that a sale of the land by the state while holding the paramount title was a hostile assertion of title sufficient to justify abandonment and a suit upon the covenant. Green v. Irving, 54 Miss. 450.

[1] Dyer v. Britton, 53 Miss. 270; Mason v. Cooksey, 51 Ind. 519; Scott v. Kirkendall, 88 Ill. 465; Kellogg v. Platt, 33 N. J. L. 328; Bundy v. Ridenour, 63 Ind. 406; Cockrell v. Proctor, 65 Mo. 41.

[2] Rindskopf v. Loan Co. 58 Barb. (N. Y.) 36; Rea v. Minkler, 5 Lans. (N. Y.) 196; King v. Kerr, 5 Ohio, 154. A wood-lot was conveyed with covenant of warranty, and an agent of one having a paramount title, without any written or special authority to oust the grantee, entered and cut wood upon the lot. *Held*, that this was a breach of the covenant of the grantor on which an action might be sustained, though no notice was given him that the grantee had been evicted by claim of paramount title. Burrage v. Smith, 16 Pick. (Mass.) 56.

[3] Pryse v. McGuire, 81 Ky. 608; Moore v. Vail, 17 Ill. 185; Jones v. Warner, 81 Ill. 343.

of warranty for a failure of title by such means; because, it is said, they have lost their lands, not by a title paramount existing at the time of executing the covenant, but by their own laches in suffering an imperfect and inferior claim of title to become a legal title paramount to theirs.[1] The mere existence of a paramount title will not constitute a breach of the covenant of warranty, nor will it authorize the covenantee to refuse to take possession when it is quietly tendered to him, or when he can do it peaceably.[2] Where the covenantee relinquishes possession he must assume the burden of showing the necessity for so doing.[3]

A covenantor of title is bound by a judgment of eviction against the person to whom the covenant has run, where such covenantor appeared and defended the action[4] or was duly notified so to do;[5] and in the absence of any showing of fraud or collusion, such covenantor who has neglected to defend will not be permitted, in an action brought upon the covenant, to prove that the judgment of eviction was not upon an adverse or superior title, even though the covenantee, to save himself from eviction under the judgment, purchased the outstanding title.[6] But unless the covenantor had notice of the ejectment suit, either oral or written, from the covenantee, in time to appear and defend, he is not estopped by a judgment of eviction against the covenantee from proving title in himself.[7] In such a case the record of eviction is no evidence that the eviction was under title paramount, and the person suing upon the covenant must bear the burden of proof and show by evidence *dehors* the record that the judgment was by force of an adverse or superior title; or, in other words, that if the covenantor had appeared and defended the action of ejectment, he could not have prevented a recovery.[8] Where, however, he has notice of the pendency of the action of ejectment, the record of recovery furnishes evidence that the eviction was under paramount title, and if he appears and defends the action the

[1] Rindskopf v. Loan Co. 58 Barb. (N. Y.) 36.

[2] Moore v. Vail, 17 Ill. 185.

[3] Claycomb v. Munger, 51 Ill. 373.

[4] Wendel v. North, 24 Wis. 223; Sisk v. Woodruff, 15 Ill. 15.

[5] Wendel v. North, 24 Wis. 223.

[6] McConnell v. Downs, 48 Ill. 271.

[7] Somers v. Schmidt, 24 Wis. 417.

[8] Sisk v. Woodruff, 15 Ill. 15; Claycomb v. Munger, 51 Ill. 373.

recovery is conclusive evidence of a breach of the covenant of warranty.

§ 12. **Continued — Measure of damages.** It is a question of some controversy whether the value of the land at the time of sale or its value at the time of eviction forms the true basis for the measure of damages, when there has been a breach of a covenant of warranty. In many, perhaps a majority, of the states, as well as in the supreme court of the United States, the basis of the measure is usually fixed at the value of the land at the time of sale,[1] together with interest and reasonable costs and expenses incurred in resisting eviction.[2] This value is usually represented by the purchase money paid for the land, which is regarded as an agreed value; and whether the consideration was paid in money or in other property at a fixed price or valuation is immaterial.

In a few states the covenant of warranty and other real covenants similar to it are regarded much the same as other personal covenants, and such states adopt as the basis of the measure of damages for the breach of such covenants very much the measure which controls in ordinary personal cove-

[1] Williamson v. Test, 24 Iowa, 138; Morris v. Rowan, 17 N. J. L. 304; Drew v. Towle, 30 N. H. 531; Cox v. Henry, 32 Pa. St. 18; Dalton v. Bowker, 8 Nev. 190; Stout v. Jackson, 2 Rand. (Va.) 132; Wade v. Comstock, 11 Ohio St. 71; Whitlock v. Crew, 28 Ga. 289; Phillips v. Reichart, 17 Ind. 120; McGary v. Hastings, 39 Cal. 360; Kennedy v. Davis, 7 T. B. Mon. (Ky.) 376. As a reason for this it is said that the covenant of warranty, being a substitute for the old *warrantia chartæ*, contained generally in feoffments, the measure of recovery should follow that of the old action of *warrantia chartæ*, which was the value of the land at the time of sale, and not at the time of eviction. See Moreland v. Metz, 24 W. Va. 119; Wood v. Coal Co. 48 Ill. 356; Armstrong v. Percy, 5 Wend. (N. Y.) 535; Wade v. Comstock, 11 Ohio St. 71.

[2] Kingsbury v. Milner, 69 Ga. 502; Stebbins v. Wolf, 33 Kan. 765; Weber v. Anderson, 73 Ill. 493. While originally the purchaser only recovered the purchase money paid, yet after the introduction of the action for mesne profits, which takes from the purchaser on eviction the profits of the land, the rule was adopted allowing him interest in lieu of such profits; and the rule is now established that he may recover interest so long as he is liable for mesne profits. Caulkins v. Harris, 9 Johns. (N. Y.) 324; Wood v. Coal Co. 48 Ill. 356; Cox v. Henry, 32 Pa. St. 18; Dalton v. Bowker, 8 Nev. 190; Williamson v. Test, 24 Iowa, 138; Drew v. Towle, 30 N. H. 531; Burton v. Reeds, 20 Ind. 87.

nants; that is, instead of putting the vendee in the position in which he would have been had he never entered into the contract, restoring to him his purchase money, interest, etc., they assume rather to put him in the same condition in which he would have been if the vendor's covenant had never been broken. This is done by adopting as the basis of damages the value of the land, including all improvements, at the time of eviction.[1] This rule, however, seems to be mainly confined to that portion of the country known as the New England states; and though it has received some recognition in other localities, as evidenced by the earlier reports, the general rule as first stated seems to prevail; and where there has been a total breach of the covenant, the vendee and his assigns will be entitled to recover only the original consideration paid for the land with interest.[2]

It has been said that the rule which gives the value of the land at the time of eviction rather than at the time of sale was adopted in the first settlement of the country, when the value of lands consisted chiefly in the improvements made by the occupants, and if, on ouster, the warranty would not have secured to them the value of these improvements they could have derived little benefit from it;[3] and it is not to be denied that there is much force of reason in the proposition that the true measure of damages in all actions of covenant is the loss actually sustained. But if the rule were permitted to obtain it would include not only the increased value arising from improvements placed upon the land, but also that peculiar value

[1] Gore v. Brazier, 3 Mass. 523; Wyman v. Ballard, 12 Mass. 304; Stout v. Jackson, 2 Rand. (Va.) 132; Swett v. Patrick, 12 Me. 9; Elder v. True, 30 Me. 104; Park v. Bates, 12 Vt. 381; Sterling v. Peet, 14 Conn. 245; Witherspoon v. McCalla, 3 Desaus. (S. C.) 245. Where land, subject to a mortgage, is conveyed with a covenant of warranty, and the grantee is ousted by the mortgagee, the rule of damages is the value of the estate at the time of the ouster, unless that value exceeds the amount due on the mortgage; but if it exceeds that amount, then that amount is the measure of damages. White v. Whitney, 3 Met. (Mass.) 81.

[2] Bennett v. Jenkins, 13 Johns. (N. Y.) 50; McClure v. Gamble, 27 Pa. St. 288; Nutting v. Herbert, 35 N. H. 120; Clark v. Parr, 14 Ohio, 118; Cox v. Strode, 2 Bibb (Ky.), 272; Coffman v. Huck, 19 Mo. 435; Elliot v. Thompson, 4 Humph. (Tenn.) 99; Martin v. Gordon, 24 Ga. 533; Brandt v. Foster, 5 Iowa, 287; Hall v. York, 22 Tex. 641.

[3] Gore v. Brazier, 3 Mass. 523.

or appreciation which attaches by reason of association with surrounding lands and improvements. And so, it has been held, the great appreciation in values which marks the lands in many of the rapidly growing and populous cities is such that it can hardly be supposed any prudent man would undertake to answer the incalculable damages which might overwhelm him or his family if the value at the time of eviction were suffered to form the standard of recovery.[1] Again, it is undeniable that the covenant when made has reference only to the land as it then exists and with respect to present worth. Notwithstanding the purchaser may have just expectations of a great rise in value or contemplate extensive improvements, yet such expectations or contemplations are confined to himself alone, and in no sense enter into or form a part of the contract.[2] So, too, a vendor may be presumed at all times to be able to return the consideration which he actually received; but to compel him to pay for expensive improvements, of the event of which he could have made no calculation, and for which he received no consideration, is contrary to the spirit of the law and opposed to every principle of natural justice. The general rule which fixes the damages at the consideration money and interest may therefore be said to fully express and be in conformity with the intention of the parties; and where the vendor who, in good faith and with a perfect confidence in the validity of the title, conveys land, and on a subsequent failure of title offers to refund all that he has received, with interest, he does everything which, upon principles of the most rigorous justice, ought to be exacted from him. If any imposition is practiced by the grantor by the fraudulent suppression of truth or suggestion of falsehood in relation to the title, the grantee has a perfect remedy in another action, and in such action may recover to the full extent of his loss.

Where the title fails to a part of the tract sold for a gross sum the measure of damages for a breach of the covenant will be the relative value of the land to which the title has failed, as compared to that which is valid, in proportion to the price

[1] Bender v. Fromberger, 4 Dall. (U. S.) 442.

[2] Pitcher v. Livingstone, 4 Johns. (N. Y.) 1.

paid for the whole.[1] In either case, where no eviction is had, and the paramount title is purchased for less than the price originally paid, the recovery will be limited to the amount paid for such paramount title and interest.[2]

§ 13. **Attorneys' fees.** As to the allowance of attorneys' fees paid by the purchaser in defending the title there is a marked difference of decision in different states. In New York,[3] and other states following its precedents, they are allowed as damages; in Massachusetts,[4] and other states following its precedents,[5] they are not allowed, especially where there is no question of fraud, imposition or malicious conduct involved.[6] It is contended, in support of the latter doctrine, that while land may be sold for a few hundred dollars, both parties believing the title to be good, its value may be enhanced fifty-fold by improvements and the fluctuations of the market; that the defense of the title in such case might require the expenditure in counsel fees of an amount many times greater than that of the purchase money of the land and interest thereon; and the value of the improvements, far more than of the land, would furnish the estimate of the counsel fees in defending the title; that if these counsel fees were allowed as against the warrantor, it would often be hazardous in the extreme to sell real property at any price that purchasers could afford to give for land upon which to make valuable improvements.[7]

The larger and apparently better considered class of cases, however, all incline to the doctrine that the purchaser is entitled to reimbursement for his necessary costs and expenses

[1] Major v. Dunnavant, 25 Ill. 262; Raines v. Calloway, 27 Tex. 678; Mischke v. Baughn, 52 Iowa, 528; Dimmick v. Lockwood, 10 Wend. (N. Y.) 142; Long v. Sinclair, 40 Mich. 569.

[2] Weber v. Anderson, 73 Ill. 439; Brady v. Spruck, 27 Ill. 479; Leffingwell v. Elliott, 10 Pick. (Mass.) 204; Fumas v. Durgin, 119 Mass. 500; Holbrook v. Wetherbee, 12 Me. 502; Burk v. Clements, 16 Ind. 132; McGary v. Hastings, 39 Cal. 360; Hurd v. Hall, 12 Wis. 112; Yokum v. Thomas, 15 Iowa, 67; Allis v. Ninginger, 25 Minn. 525; Dickson v. Desire, 23 Mo. 151.

[3] Rickert v. Snyder, 9 Wend. (N. Y.) 422.

[4] Leffingwell v. Elliott, 10 Pick. (Mass.) 204.

[5] Sarpy v. New Orleans, 14 La. Ann. 311.

[6] Turner v. Miller, 42 Tex. 418; Terry v. Drabbenstadt, 68 Pa. St. 400.

[7] Turner v. Miller, 42 Tex. 418.

incurred in defending the title, and that such costs and expenses include a reasonable attorney fee.[1] It has been held in some instances that the allowance of a counsel fee is conditional upon the action of the covenantor, and that the covenantee cannot recover the fees paid by him in voluntarily defending the ejectment suit as part of his damages in an action against the covenantor on the covenants of title; and that it is only when the covenantor refuses, after notice given, to defend the title, that the covenantee has the right to employ counsel for that purpose, and to recover such reasonable fees as he has been compelled to pay.[2]

The doctrine has been extended by some of the cases to cover the expenses incurred by the covenantee in actions which he initiates to ascertain and protect his title; and it is held by such cases that it is not necessary, in order to give the covenantee a right of recovery, that such costs and expenses should be incurred only in actions which he is obliged to defend on the assertion of a superior title.[3]

§ 14. **Condemnation of property sold.** Where the owner of land sells it, giving a contract for a deed of general warranty to be made on final payment, and between the sale and the making of the deed a portion of the premises is condemned under the right of eminent domain for public or *quasi* public purposes, the incumbrance thus created is not one for which damages can be recovered in an action on the covenants in the deed. The reason for this is that the condemnation, in such a case, is practically a sale of the land by the purchaser, for which the law secures to him, and he is supposed to receive, full compensation; and notwithstanding that it is in its nature a forced sale, yet the purchaser is entitled to no more claim against his vendor on the covenants of a deed subsequently made than he would have if he had made a private voluntary sale. If the vendor has received the condemnation money and

[1] Keller v. Wood, 30 Vt. 242; Dalton v. Bowker, 8 Nev. 190; Taylor v. Halter, 1 Mon. T. 688; Lane v. Fury, 31 Ohio St. 574; Swartz v. Ballou, 47 Iowa, 188; Swett v. Patrick, 12 Me. 9; Drew v. Towle, 30 N. H. 531; Harding v. Larkin, 41 Ill. 413.

[2] Crisfield v. Storr, 36 Md. 129.

[3] See Haynes v. Stevens, 11 N. H. 28; Gregg v. Richardson, 25 Ga. 570; Pitkin v. Leavitt, 13 Vt. 379; Yokum v. Thomas, 15 Iowa, 67; White v. Williams, 13 Tex. 258.

fails or refuses to account therefor to the vendee, the latter would probably have his option between an action for the same as money had and received to his use or an action on the covenants in his deed, the vendor in such case holding the damages in trust for the vendee, to be accounted for when the purchase money is paid.[1] If, on the other hand, the vendee has himself received the damages for the condemnation, without objection on the part of the vendor, he could not be heard to ask, after he receives his deed, that the vendor should also respond to him upon the covenants. So, also, if at the condemnation of the land the damages are not paid in money, but in special benefits to the land, there would be the same reason why the vendor should not be subjected to a suit after he has made his deed that there would have been if the purchaser had received for his own use the damages in money. In both cases he has received the consideration for the forced sale and should not be permitted to demand it twice.[2]

§ 15. Further assurance. Where a purchaser, in addition to the other covenants for title, has taken a covenant for further assurance, it would seem that the vendor is not in default until the purchaser has made demand upon him for some particular assurance or conveyance.[3] Where the covenant is general and does not specify the particular conveyance to be made, but only such as may prove necessary or be advised by counsel, the party claiming under it should demand such a conveyance as he conceives himself entitled to before he can allege a breach and maintain an action for damages.[4]

§ 16. Division of covenants. It is one of the doctrines of the common law that an entire contract cannot be apportioned,

[1] While the damages to the land belong in equity to the purchaser, yet, when paid in money, if the security of the vendor would be impaired by the receipt of the same by the purchaser, he might insist they should not be paid until his security be increased to that extent, and the purchaser would have a corresponding right to security if about to be placed in jeopardy by the payment of damages to the vendor. Stevenson v. Loehr, 57 Ill. 509.

[2] Stevenson v. Loehr, 57 Ill. 509.

[3] It would seem that the usual mode in England is for the purchaser to submit to his grantor a draft of the intended assurance with the opinion of counsel as to its necessity and propriety. See Rawle on Covenants, § 99.

[4] Fields v. Squires, Deady (C. Ct.), 388.

but this principle is limited to personal contracts; and while a covenant, personal in its character, is controlled by this rule, yet it will not extend to such as run with the land.[1] Hence, where a covenant running with the land is in its nature divisible, and the entire interest of separate parts passes to different individuals, a right of action accrues to each party to recover his portion of the warranty.[2] So, also, in such a case, the assignee of each part would be answerable for his proportion of any charge upon the land which was a common burden, and would be exclusively liable for the breach of any covenant which related to that part alone.[3]

§ 17. **Set-off by covenantor.** By the statute, provision is now generally made for a set-off of mutual debts; and, independently of statutory provisions, mutual debts growing out of the same transaction or subject-matter have long been permitted to be set off in equity. Hence, in actions on the covenants, while the court will give to the plaintiff the actual damages sustained by the breach of the covenant, it will also permit the defendant to set off or recoup any obligation or debt in his hands, particularly if arising out of the same transaction. Thus, notes given for the purchase money constitute a proper equitable set-off, and may be pleaded as such, although the notes as an independent cause of action are barred by the statute of limitations.[4] This is contrary to the general rule in respect to counter-claim and recoupment, which is that the statute of limitations applies as well to a demand attempted to be set off as to one upon which an action is brought, and that a claim which is barred thereby is not available as a set-off or counter-claim.[5] But in this respect it is contended that applying the unpaid portion of the purchase money in reduction of the plaintiff's demand is but an application of the principle that if the grantee fails to pay the purchase money — the real consideration for the deed — he is not entitled to recover in an action on the covenants — certainly no more than nominal

[1] Van Rensselaer v. Bradley, 3 Denio (N. Y.), 141.

[2] Damainville v. Mann, 32 N. Y. 204; St. Clair v. Williams, 7 Ohio, 110.

[3] Astor v. Miller, 2 Paige (N. Y.), 69.

[4] Beecher v. Baldwin, 55 Conn. 419.

[5] Harwell v. Steele, 17 Ala. 372; Nolin v. Blackwell, 31 N. J. L. 170; De Lavalette v. Wendt, 75 N. Y. 579; Taylor v. Gould, 57 Pa. St. 152; Lyon v. Petty, 65 Cal. 322.

damages; and that to such a claim when offered as a set-off, or, more accurately speaking, by way of recoupment, the statute of limitations has no application.[1]

§ 18. Covenants of married women. By the rules of the common law a married woman incurs no legal liability by reason of contracts made during coverture. To this general rule an exception seems to have been early made in England, in a case where husband and wife united in a conveyance of the wife's lands with warranty by levying a fine, and an action in such case was permitted to lie against the wife, after the death of the husband, for a breach of the covenants. The ancient ceremony of levying a fine never obtained to any extent in this country; and though some of the early cases, acting upon the doctrine which it inculcates, held that, where the wife had submitted to separate examination, and otherwise complied with the regulations of the statute relative to execution and acknowledgment, her covenants became obligatory upon her, the later and generally observed doctrine was that the statutory permission to convey, by uniting in a joint deed with her husband, enabled her only to pass her title, and created no liability upon a breach of the covenants of warranty.[2] In like manner her covenants were, in many instances, held to create no estoppel,[3] though upon this point there seems to have been considerable diversity of opinion.[4]

It is an ancient doctrine of equity, however, that where a married woman is protected in her separate estate she should be correspondingly bound; and as she has long been accorded the same recognition with respect thereto as though she were sole, so it has frequently been held in equity that a married woman may bind her separate estate by any contract by which she could bind herself if unmarried, and that, upon this principle,

[1] Beecher v. Baldwin, 55 Conn. 419. And see King v. King, 9 N. J. Eq. 44; Morrow v. Hanson, 9 Ga. 398.

[2] See Porter v. Bradley, 7 R. I. 511; Colcord v. Swan, 7 Mass. 291; Sawyer v. Little, 4 Vt. 414; Wadleigh v. Glines, 6 N. H. 17; Martin v. Dwelly, 6 Wend. (N. Y.) 9. And see Rawle on Covenants (3d ed.), 579; 2 Kent, Com. 167.

[3] Jackson v. Vanderheyden, 17 Johns. 167; Gonzales v. Huckie, 49 Ala. 260; Wadleigh v. Glines, 6 N. H. 18; Hopper v. Demarest, 21 N. J. L. 525.

[4] See Lessee of Hill v. West, 8 Ohio, 225; King v. Rea, 56 Ind. 19.

she has power to bind her separate estate by the covenants of a deed.[1]

Legislation has in many states supplied the omissions of the common law, and in some instances abolished all distinctions between the liability at law or in equity, but the subject is still involved in controversy and doubt. The effect of the "Married Women's Acts" has not been the same in all states where such laws have been adopted, and in only a very few is there an express provision that a married woman shall be bound by her covenants.[2] The general doctrine is as first stated, and this may be considered the rule of law except where altered by local legislation.

§ 19. **Parol evidence of warranty.** It is a general rule that when the contract of parties has been reduced to writing and is apparently complete, the written instrument is supposed to contain the whole contract, and it cannot be varied by parol. This rule is very generally recognized with respect to contracts relating to personal property, and is usually applied where the subject-matter is real estate; yet it has been held that contracts in respect to the sale and conveyance of land form an exception to this general rule, or rather that they do not come within it. In support of this deduction it is said that preceding the conveyance there is, of course, always an agreement of sale; that the deed may contain only a very small part of such contract, and is made only in execution of the same; that it does not attempt to state the entire agreement in respect to the subject-matter, but is merely adapted to transfer the title in part execution of the contract. Deeds are supposed to contain only the ordinary covenants of title, and seldom, if ever, contain a covenant of warranty in respect to the quality of the land or other collateral matters. Hence it is held that an agreement or covenant of warranty as to the quality of the land, as well as to many other things which

[1] Gunter v. Williams, 40 Ala. 561; Kolls v. De Leyer, 41 Barb. (N.Y.) 208.

[2] Laws of this kind are in force in New York, Rhode Island, Indiana and Maryland. In Arizona, Colorada, New Mexico, Nebraska, Nevada, Missouri and West Virginia the doctrine of the common law seems to prevail. In Iowa, Delaware, New Jersey and other states a liability may be created to a certain extent by express language in the deed.

were part of the prior or contemporaneous agreement of sale, may be shown by parol.[1]

It must seem at first blush that the foregoing principles are in direct contradiction to elementary and well-recognized rules. Except in case of fraud or mistake the general doctrine certainly is that parol evidence is inadmissible to contradict or vary the terms of a deed; and it would seem to be equally well settled that where a deed purports to contain the covenants of the grantor, such covenants cannot be extended by proof of parol agreements or verbal warranties made prior to or contemporaneous with the execution or delivery of the deed.

There are, however, a number of cases which, if they do not support, at least lend color to the doctrine first stated. Thus, it has been held that while a conveyance of land may be complete for its purpose, which is to declare and prove the fact of conveyance, yet, as it may be considered as but part execution of a prior contract, parol evidence is admissible to show the true consideration "and all other parts of the transaction," provided the fact of conveyance be not affected by it.[2] But generally, where parol evidence is admitted, it is to establish some collateral undertaking, separate and distinct from the deed.[3] With respect to these cases it is said they do not depart from the general rule, and that the parol evidence is admitted, not for the purpose of affecting the interpretation of the instrument, but simply by enlarging the sphere of action to embrace the whole transaction to which the instrument belongs, and to define all the rights growing out of the case. It is difficult, however, to reconcile the palpable results of the application of these doctrines with the well known and fundamental rules which have so long obtained in the exposition of deeds and other writings, and possibly if the attempt were to be made it could only be accomplished by doing violence to both.

[1] Green v. Batson, 71 Wis. 54. And see Hubbard v. Marshall, 50 Wis. 326.

[2] See Miller v. Fichthorn, 31 Pa. St. 260; Carr v. Dooley, 119 Mass. 294; Ludeke v. Sutherland, 87 Ill. 481; Ingersoll v. Truebody, 40 Cal. 603; Kingsbury v. Moses, 45 N. H. 223.

[3] See Buzzell v. Willard, 44 Vt. 44; Carr v. Dooley, 119 Mass. 294; McCormick v. Cheevers, 124 Mass. 262.

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